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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ANGEL MARTEL,

Petitioner,

vs.

COUNTY OF LOS ANGELES, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Where a litigant seeks a new trial for reason that discovery was substantially and erroneously restricted by the district court, may the litigant make the requisite showing of prejudice without affirmatively pinpointing how facts obtained through additional discovery would likely have changed the outcome of the trial?

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vs.

COUNTY OF LOS ANGELES, et al.,

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Angel Martel, respectfully prays that a writ of certiorari issue to review the en banc decision of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on June 1, 1995.

DECISIONS BELOW

In a panel decision filed September 6, 1994, the Ninth Circuit Court of Appeals reversed the judgment of the United States District Court for the Central District of

California and remanded the Appellant's case for a new trial. The Court of Appeals ruled that the trial court had abused its discretion in denying Appellant a continuance for purposes of conducting discovery, and that Appellant had been prejudiced by such judicial error. The panel opinion is reported at 34 F.3d 731 (9th Cir. 1994); the slip opinion appears as Appendix "A" hereto.

On November 14, 1994, a majority of the active, nonrecused judges of the Ninth Circuit voted to rehear the case en banc. In the ensuing decision, a sharply divided Court of Appeals ruled that Appellant had failed to demonstrate that he was prejudiced by the trial court's denial of his motion for a continuance to conduct discovery. The en banc decision did not address the issue of trial court error. The court's opinion is reported at 56 F.3d 993 (9th Cir. 1995); the slip opinion appears as Appendix "B" hereto.

JURISDICTION

The district court had jurisdiction of this action under 42 U.S.C. §1983 and 28 U.S.C. §§1331 and 1343.

The Court of Appeals had jurisdiction under 28 U.S.C. §1291.

The jurisdiction of this Court to review the final order of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTE AND RULES INVOLVED

Title 28 United States Code, §2111, appears as follows:

> **§2111. Harmless error**
>
> On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.

Rule 61 of the Federal Rules of Civil Procedure ("FRCP") states as follows:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or

> omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 10(b)(2) of the Federal Rules of Appellate Procedure ("FRAP") states as follows:

> If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such findings or conclusion.

PARTIES

The Plaintiff/Appellant is Angel Martel. The Defendants/Respondents are the County of Los Angeles, Los Angeles County Sheriff Sherman Block, and Los Angeles County Sheriff's Deputies Elias Cuevas, Harry DeLong, Richard Mariadiaga, Mark Shaugnessy, Herb Howland, Jeffrey Lammers, Margarito Robles and Frank Yanes.

STATEMENT OF THE CASE

Judge Steven V. Wilson has a standing order, issued to all litigants in his court, which states as follows:

> This court strives to set trial dates as early as possible and does not approve of protracted discovery. EXCEPT FOR UNUSUALLY COMPLEX CASES, COUNSEL SHOULD EXPECT THE CASE TO GO TO TRIAL WITHIN THREE MONTHS OF THE FILING OF THE FIRST ANSWER. . . . Continuances are rarely granted. . . . The

Court sets firm trial dates and will not change them except for emergencies.

Martel v. County of Los Angeles, 34 F.3d at 732-33, slip op. at 10357 (hereinafter cited as "Panel op.").

Judge Wilson's standing order was issued to the Appellant (hereinafter "Martel") on April 24, 1991, two days after Martel filed his complaint herein. The standing order is routinely enforced in Judge Wilson's court, notwithstanding that it "conflicts squarely with the local rules" of the Central District of California, which "provide for a minimum of 154 days between service of the first answer and the pre-trial conference." Panel op., 34 F.3d at 736, slip op. at 10365.[1]

On April 22, 1991, Martel had filed a civil rights action against the Respondents seeking damages under 42 U.S.C. §1983 and asserting supplemental claims under state law. The complaint named Los Angeles County, its

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1 In Martel's case, the trial court provided only 101 days between service of the first answer on May 17, 1991, and the pretrial conference on August 26, 1991. Panel op., 34 F.3d at 737, slip op. at 10365-66.

Sheriff, a sheriff's deputy and several unidentified "John Doe" deputies. Panel op., 34 F.3d at 732, slip op. at 10356-57. Martel's case was assigned randomly to Judge Wilson by the district court clerk.

Martel's complaint arose from a June 6, 1990, confrontation with eight sheriff's deputies who arrived at his residence pursuant to an emergency telephone call from Martel's wife. *Id.* Martel, who had been medically diagnosed as paranoid schizophrenic, had taken a shotgun into his backyard upon experiencing delusions of an intruder attempting to break into his automobile. *Id.* Martel alleged that after the deputies successfully restrained him and removed the shotgun from his possession, they unnecessarily beat him with batons and flashlights, kicked him and shocked him with a taser gun. *Id.* As a result of the alleged excessive force, Martel suffered severe injuries including a broken left kneecap and a broken right leg. *Id.*

Martel initiated discovery immediately after bringing suit. Panel op., 34 F.3d at 733, slip op. at 10357. The complaint served upon the County was accompanied

with interrogatories requesting, *inter alia*, the names of all unidentified deputies who participated in Martel's apprehension. *Id.* Martel subsequently discovered the names of all eight deputies involved in the incident and amended his complaint accordingly. *Id.* Although Martel promptly served the newly named defendants with written discovery, responses thereto were not due until after the trial date, which had been set by the court for August 27, 1991. Panel op., 34 F.3d at 733, slip op. at 10358.

On August 22, 1991, Martel filed an ex parte application to continue the trial date. As grounds for the requested continuance, Martel stated that the aforementioned written discovery responses were not yet due, that he had not yet had the opportunity to depose any of the defendants, and that a motion to compel responses to written discovery served on the county was pending. *Id.* The district court denied Martel's application for a continuance. The court granted a defense motion for bifurcation, and trial on the issue of liability began, as

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scheduled, on August 27, 1991.[2]

The jury returned a verdict for Respondents and judgment was entered accordingly. Martel's appeal was based solely on the district court's denial of his request to continue the trial so that he could depose the defendants and complete other essential discovery. *Martel v. County of Los Angeles,* 56 F.3d at 995, slip op. at 5990 (hereinafter cited as "En banc op.").

The Ninth Circuit panel concluded that the trial judge abused his discretion in refusing to postpone the trial date. The panel concluded that Martel's failure to depose any of the eight deputies "was not the result of any lack of diligence on his part", and that "a continuance was necessary . . . only because of the district judge's decision to schedule the trial at a date that was too early to permit

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2 *See, Martel v. County of Los Angeles,* 56 F.3d at 999, slip op. at 6000 (Kleinfeld, J., dissenting from en banc judgment). In support of her motion for bifurcation, defense counsel indicated that she, too, was not ready for trial on the damages issue, because she had not yet deposed Martel's physicians or retained expert medical witnesses. *Id.*

the parties to take reasonable discovery." Panel op., 34 F.3d at 734, slip op. at 10359.

The panel decision articulates the court's position that it will not reverse a judgement without a demonstration of prejudice. Panel op., 34 F.3d at 733, slip op. at 10359. However, the panel found that the district court's "rocket docket policy" had "affected every aspect of the trial" and "manifestly prejudiced [Martel's] ability to prepare and present his case." Panel op., 34 F.3d at 735, 737, slip op. at 10362, 10366. Accordingly, the panel held that Martel had satisfied the prejudice requirement by showing that the trial court's denial of the requested continuance had "denied him meaningful discovery." Panel op., 34 F.3d at 735, slip op. at 10363.

In ruling on the issue of harmless error, the Ninth Circuit panel considered the Respondents' argument that Martel's appeal should be dismissed because he had not filed a trial transcript under FRAP Rule 10(b)(2). The panel rejected the suggestion that Martel was obligated to file such a transcript, holding that Rule 10(b)(2) "does not impose a *general* obligation on *all* appellants to file a trial

transcript in the court of appeals." Panel op., 34 F.3d at 737, slip op. at 10367 (emphasis original). The panel reasoned that Martel's objection was not to any particular act or omission by the district court during the course of the trial, but rather to "the very fact that the trial was held at the time it was". *Id.* [3]

In contrast to the panel opinion, the Ninth Circuit's en banc decision is expressly limited to the issue of "actual and substantial prejudice." En banc op., 56 F.3d at 995, slip op. at 5991. The en banc opinion does not address whether the trial court abused its discretion in denying Martel a continuance to conduct discovery. *Id.*

The decision holds that Martel, by providing no trial transcript, failed to demonstrate that judicial error, if it occurred, resulted in prejudice to his case. The court acknowledged that additional discovery, particularly depositions of the defendants, may have "revealed lines of

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3 Martel furnished the Court of Appeals with a transcript of the hearing at which the district court denied his request for a continuance. Panel op., 34 F.3d at 738, n. 6, slip op. at 10369, n. 6.

attack on the deputies' credibility or inconsistences in their recollection". En banc op., 56 F.3d at 996, slip op. at 5992. The foregoing notwithstanding, Martel was required to "tell us what facts he would have gained from the deputies that would have advanced his cause at trial." En banc op., 56 F.3d at 996, slip op. at 5993.

The core of the Ninth Circuit's en banc decision is its holding that

> [p]rejudice is measured in terms of the outcome of the trial; in other words, is there a reasonable probability that the outcome would have been different had the continuance been allowed.

En banc op., 56 F.3d at 995, slip op. at 5991. Accordingly, the opinion concludes with the following language:

> Martel failed to meet the required showing of actual and substantial prejudice because he made no effort to indicate what, if any, facts would have been gained from additional discovery and why, if at all, these facts would have affected the result of the trial. . .

> Martel's failure to tell us with any clarity what facts he would have discovered, specifically from deposing the sheriff's deputies, and his failure to provide us with the record of what transpired at trial fall short of the level needed to convince us that the result at trial might have been different had the continuance been granted.

En banc op., 56 F.3d at 997, slip op. at 5995.

Judge Kleinfeld filed a vigorous and strongly worded dissent to the court's en banc decision. His dissent was joined in by Judges Fletcher and Reinhardt and adopted, in part, by Judges Canby and Nelson, who concurred in the en banc judgment. According to the dissent, the Ninth Circuit's new standard for establishing prejudice when discovery has been erroneously restricted departs from precedent and requires a showing "which is, as a practical matter, impossible". En banc op., 56 F.3d at 998, slip op. at 5997 (Kleinfeld, J., dissenting).

> Of course plaintiff cannot show what he would have gained from the discovery and

> how it would have affected the result at trial. He never got a chance to do the discovery, so he cannot know. . . . If we adhere to precedent, as I think we should, prejudice in the context of denial of a continuance means an inability to collect material evidence or locate material witnesses. It does not mean facts which would have been obtained and would have affected the outcome.

En banc op., 56 F.3d at 1001, slip op. at 6004-05 (Kleinfeld, J., dissenting).

REASONS FOR GRANTING THE WRIT

I.

The Court should resolve the sharp division that has now arisen among the courts of appeals with respect to the requisite showing of prejudice where a litigant seeks a new trial on grounds that judicial error has substantially interfered with his ability to prepare and present his case to the jury.

In the wake of the Court of Appeals' en banc decision herein, a Ninth Circuit litigant whose pre-trial discovery is erroneously curtailed henceforth must

demonstrate prejudice by a clear showing that particular facts gained through discovery would have altered the result at trial. Appellant does not gainsay that such an outcome-oriented inquiry may well be appropriate for the typical post-trial appeal wherein specifically identifiable evidence, possessed and controlled by the litigant, is erroneously ruled inadmissible by the district court. *See, e.g., Fenner v. Dependable Trucking Company,* 716 F.2d 598, 600-02 (9th Cir. 1983). In such instances, an appellate court's harmless error analysis under 28 U.S.C. §2111 and FRCP Rule 61 may reasonably consider whether admission of the excluded evidence would likely have changed the jury's verdict.

An outcome-oriented approach, however, is not properly applied in a situation where an erroneous trial court order has precluded the very gathering of material facts which would have been necessary to alter the adverse result suffered by the litigant at trial. In such a case, the Ninth Circuit's result-focused analysis would have the absurd tendency to find the error harmless whenever curtailment of discovery had been most egregious.

Accordingly, placing the burden on appellant to show how discovery of unrevealed facts would alter the jury's verdict creates an inverse relationship between the gravity of judicial error and the appellant's likelihood of obtaining a new trial.

In cases like Martel's, harmless error analysis requires an approach tailored to the practical impossibility of demonstrating the probative value of facts that have never been ascertained, physical evidence that has never been collected or witnesses that have never been identified. It has long been a fundamental policy of American jurisprudence that "[r]ules of practice and procedure are devised to promote the ends of justice, not to defeat them." *Hormel v. Helvering*, 312 U.S. 552, 557, 61 S.Ct. 719, 721 (1941). This policy is subverted by a "rigid and undeviating judicially declared practice" under which an appellate court "invariably and under all circumstances" applies the same analytical procedure to widely divergent circumstances. *Id.* As explained hereinbelow, the practice of other circuits is to allow for exigencies faced by appellants who, because of trial court error, are not in

possession of sufficient facts to prevail in a strictly outcome-oriented analysis of harmless error. Accordingly, the law in these circuits contrasts and conflicts with the Ninth Circuit's inflexible approach to determining prejudicial error.

Degelos v. Fidelity and Casualty Company of New York, 313 F.2d 809 (5th Cir. 1963), was a diversity personal injury action wherein the Court of Appeals considered the prejudicial affect of an erroneous ruling effectively disallowing plaintiff's cross-examination of a critical adverse witness. Just as Martel was severely limited in his cross-examination of the sheriff's deputies by his inability to depose any of them prior to trial, so the plaintiff in *Degelos* was barred from asking leading questions of an adverse witness whom she called to testify.

> [B]eing a mechanism for the resolution of man's disputes, the instrument of cross examination is an integral part of that system in order to penetrate all of the conflicting impulses or obstacles to lay bare the whole truth. And yet, from the nature of the strict

> procedural limitation imposed by the Judge, this could not be effectively done. Real cross examination was entirely missing.

Id., 313 F.2d at 813-14.

In analyzing whether the effective denial of cross-examination was prejudicial to Degelos, the Fifth Circuit distinguished the district court's order from "the case of admission or exclusion of some bit of testimony asserted on appellate review to have been erroneous." *Id.*, 313 F.2d at 814. Since the trial court had denied plaintiff the use of "a tool of advocacy . . . most effective in the quest for truth", the Fifth Circuit absolved Degelos from the burden of pinpointing harm by specific reference to the trial record. Rather, the court held that

> [i]t is sufficient if we can see, as we readily do here, that the development of this record and the development of the testimony of [the adverse witness] might well have been quite different had the Plaintiff been accorded the right to put [the witness] through all of the

> rigors of a sharp, relentless, pressing, vigorous cross-examination.

Id.

Accordingly, the Fifth Circuit will presume prejudice where an appellant, like Martel, has been deprived of a basic tool of advocacy such as effective cross-examination. [4] Although there are no reported cases from the Fifth Circuit with facts identical to *Martel*, it is beyond cavil that meaningful discovery, including the

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4 Although the burden of providing a trial transcript falls on a Fifth Circuit litigant who contends that a trial court's judgment is unsupported by the evidence, *Alizadeh v. Safeway Stores, Inc.*, 910 F.2d 234, 237 (5th Cir. 1990), the burden of placing the trial transcript in the record may shift to the appellee under appropriate circumstances. *See, United States v. Coveney*, 995 F.2d 578, 587-88 (5th Cir. 1993); *Soley v. Star & Herald Co.*, 390 F.2d 364 (5th Cir. 1968). Unlike the Ninth Circuit, the Fifth Circuit has "recognized, in the civil context, that the appellee bears some responsibility for creating a complete record on appeal." *United States v. Coveney, supra*, 995 F.2d at 587.

deposition of adverse parties, is a basic tool of advocacy in civil cases in the federal courts.

> The discovery procedures of [FRCP] Rules 16 to 37 . . . provide the means for determining the precise issues and obtaining the information that each party needs to prepare for trial. . . . [P]rior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged.

Wright & Miller, Federal Practice & Procedure §2001 (1995). It therefore follows that any pre-trial order that materially interferes with a litigant's right "to obtain the fullest possible knowledge of the issues and facts" does violence to the very spirit of civil practice in the federal courts, *Hickman v. Taylor*, 329 U.S. 495, 500, 67 S.Ct. 385, 388 (1947), and necessarily affects the substantial rights of the litigant. 28 U.S.C. §2111; FRCP Rule 61.

Like the Fifth Circuit, the Sixth Circuit does not invariably use an outcome-oriented approach to distinguish prejudice from harmless error. In *Dorsey v. City of Detroit*, 858 F.2d 338 (6th Cir. 1988), a §1983 police misconduct case, the trial court abused its discretion in admitting into evidence, over plaintiffs' objection, a police report wrongfully withheld by the city during discovery. The appellate court found that the discovery limitation had interfered with plaintiffs' ability to cross-examine defense witnesses at trial. *Id.*, 858 F.2d at 343. The court omitted discussion of whether or not discovery of the report would have made any difference in the outcome of the trial. Rather, the court held that plaintiffs were entitled to a new trial under the circumstances, because the court could not conclude that the evidence was "unlikely to have made any difference" in the verdict.

Accordingly, in a situation where a litigant is erroneously denied discovery of material evidence prior to trial, the Sixth Circuit mitigates the appellant's burden insofar as not requiring affirmative proof that discovery of the evidence would have changed the jury's verdict.

Implicit in this approach is the rebuttable presumption that denial of meaningful discovery is prejudicial to a litigant.

In contrast, the Ninth Circuit's en banc decision in *Martel* places the burden squarely on the appellant to make an affirmative showing of "what, if any, facts would have been gained from additional discovery and why . . . these facts would have affected the result of the trial". En banc op., 56 F.3d at 997, slip op. at 5995. As emphasized by the dissenting opinion herein, such a burden "is, as a practical matter, impossible" to meet. En banc op., 56 F.3d at 998, slip op. at 5997 (Kleinfeld, J., dissenting). *See, Erskine v. Consolidated Rail Corp.*, 814 F.2d 266, 271-73 (6th Cir. 1987)(court omits discussion of effect of discovery limitation on directed verdict, holding that it "cannot conclude" that plaintiff/appellant was not prejudiced where defendant's conduct during discovery deprived appellant of opportunity to develop facts necessary to present his case).

Like the Fifth and Sixth Circuits, the Fourth Circuit also declines to employ an outcome-oriented analysis where the trial court's erroneous restriction of discovery has impeded the appellant's preparation for trial. *McDougall v.*

Dunn, 468 F.2d 468 (4th Cir. 1972). In *McDougall*, the court held that plaintiff had been prejudiced by the erroneous refusal of the trial court to order disclosure of witness statements given shortly after a traffic accident. The court did not look to whether the trial would have had a different outcome had the witness statements been produced during discovery, but rather simply found that the plaintiff had "sustained a disadvantage affecting the fundamental issues of liability". *Id.*, 468 F.2d at 475.

Other circuits also decline to examine the effect on trial outcome of erroneous trial court rulings that obstruct litigants' substantial rights to discovery. *See, Marshak v. Tonetti*, 813 F.2d 13, 20 (1st Cir. 1987)(court abused discretion by accelerating trial date by nearly one month, which hampered plaintiff's case by allowing insufficient time for trial preparation); *Goldman v. Checker Taxi Company*, 325 F.2d 853 (7th Cir. 1963)(trial court denied plaintiff's motion for production of documents under exclusive control of defendant). The Ninth Circuit is apparently alone in insisting that an appellant whose discovery rights have been unduly restricted by the trial

court must affirmatively demonstrate that conducting the precluded discovery would likely have changed the jury's verdict.

II.

The Court should exercise its power of judicial supervision where the Court of Appeals has inadvertently opened the door to unrestrained abuses of judicial discretion.

The gloss imposed by the Ninth Circuit on the harmless error rule makes it virtually impossible for an appellant to obtain a new trial when the district court has abused its discretion by unduly limiting the appellant's discovery rights. The appellant is placed in a winless situation, because she must not only set forth the evidence that she had no reasonable opportunity to discover, but also explain *how* the ungathered evidence would have changed the result at trial.

The *Martel* decision paves the way for the unbridled exercise of managerial authority by a recalcitrant district judge. Even arbitrary and far-reaching orders that contravene the very letter of the Federal Rules of Civil

Procedure would go uncorrected when discovery rights were at issue, because litigants would be unable to demonstrate more than the judicial error itself. The second prong of the inquiry on appeal, that of prejudicial effect, could never be fulfilled under the Ninth Circuit's stringent new requirement for obtaining a new trial. District courts could implement their "rocket dockets" with impunity, and without concern for procedural rules, due process or appellate reversal.

The Court should not countenance such an unplanned expansion of judicial managerial authority. *See,* Myron J. Bromberg & Jonathan M. Korn, *Individual Judges' Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure,* 68 St. John's L. Rev. 1 (1994); Judith Resnik, *Managerial Judges,* 96 Harvard L. Rev. 376 (1982).

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CONCLUSION

For the foregoing reasons, Martel's petition for a writ of certiorari should be granted.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANGEL MARTEL,
Plaintiff-Appellant,

v.

COUNTY OF LOS ANGELES, SHERMAN BLOCK, SHERIFF OF LOS ANGELES COUNTY, ELIAS CUEVAS, HARRY DELONG, RICHARD MARIADIAGA, MARK SHAUGNESSY, HERB HOWLAND, JEFFREY LAMMERS, MARGARITO ROBLES, and FRANK YANES,
Defendants-Appellees.

No. 91-56268
D.C. No.
CV-91-2164-SVW
ORDER AND
OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted
April 7, 1993—Pasadena, California

Opinion Filed April 12, 1994
Opinion Withdrawn September 6, 1994
Filed September 6, 1994

Before: Jerome Farris, William A. Norris, and
Stephen Reinhardt, Circuit Judges.

Opinion by Judge Reinhardt; Dissent by Judge Norris

SUMMARY

Civil Litigation and Procedure/Discovery/ Attorneys and Judges

The court of appeals reversed a district court judgment and remanded. The court held that a district judge's refusal to grant a continuance to a plaintiff who did not have an opportunity to conduct meaningful discovery before trial constituted an abuse of discretion.

Appellant Angel Martel discharged a shotgun in his backyard. Eight sheriff's deputies responded, and attempted to restrain Martel.

On April 22, 1991, Martel sued appellees, the County of Los Angeles, the Los Angeles County Sheriff, and one named deputy sheriff, seeking, among other things, damages under the federal civil rights statutes. Martel alleged that after he surrendered to the deputies, the deputies beat him, kicked him, and shocked him with a taser, causing injuries.

Two days after Martel filed his complaint, the district judge issued a standing order, stating that counsel should expect the case to go to trial within three months of the filing of the first answer. The defendants filed an answer on May 17, 1991.

Martel initiated discovery immediately after bringing the suit. Because he did not know the identities of seven of the eight deputies who had subdued him, Martel served the County with interrogatories accompanying the complaint. The interrogatories sought the names of all of the possible defendants. The County responded on May 24, 1991.

The district judge scheduled the pretrial conference for August 26, 1991 and the trial for August 27, 1991, just over three months after the defendants filed their answer. Martel eventually discovered the names of all eight of the deputies

involved in his case. On July 22, 1991 and August 12, 1991, Martel filed amended complaints, and named seven additional deputies as defendants. Martel promptly served the new defendants with interrogatories and requests for admission, but the responses to the requests were not due until after the August 27 trial date.

Because more time was necessary to complete essential discovery, Martel moved for a continuance on August 22, 1991. Martel pointed out that the new defendants' responses to discovery requests were due after the scheduled trial date, and claimed that the original defendants had not been cooperative in discovery. Martel's counsel further stated that a motion to compel was pending, and that he had been unable to depose any of the defendants because he was a sole practitioner, and had been in trial nearly continuously since late May. The district judge denied Martel's motion.

Trial began on August 27, although Martel had not had an opportunity to depose any of the defendants. The jury returned a verdict in favor of the defendants. Martel appealed.

[1] The district judge abused his discretion in denying Martel a continuance, and this error required reversal. Martel moved for a continuance because he had not been able to depose any of the eight individual defendants, and because he had received responses to his written discovery requests only from one of them. Had the district judge moved back the trial date, Martel could have completed the necessary discovery. In addition, a brief continuance for the completion of discovery would not have caused great inconvenience.

[2] Martel's failure to depose any of the defendants was not the result of any lack of diligence on his part. Instead, it was the result of his attorney's quite busy trial schedule. [3] It was improper for the district court to hold counsel's busy schedule against his client in this case; many plaintiffs must depend upon the assistance of attorneys with high-

volume/low-margin practices if they are to have any skilled legal assistance at all. Where counsel's busy trial schedule is the primary reason for a delay in trial preparation, a continuance should generally not be denied in the absence of a prior warning, an exploration of the legitimacy of counsel's conflicting engagements and the extent to which an accommodation of counsel's schedule would prejudice the opposing party or inconvenience the court, and consideration of alternative solutions. Given the extensive written discovery in which Martel's attorney had engaged, the relatively short interval between the filing of the complaint and the trial, and the frenetic work schedule of Martel's attorney, it was an abuse of discretion for the district judge to refuse to allow Martel sufficient time to depose the defendants.

[4] In addition, the decision to force Martel to trial before he received written discovery from seven of the defendants, and before he deposed any of them, affected every aspect of the trial. It manifestly prejudiced Martel's ability to prepare and present his case. Martel showed that the district court's refusal to grant a continuance denied him meaningful discovery. [5] Thus, Martel showed sufficient prejudice to warrant reversal.

[6] There was also an independent basis for concluding that the case must be reversed. By setting the pretrial conference for approximately three months after the filing of the first answer, and setting the trial for the day after the conference, the district court violated the Local Rules of the Central District of California, which provide for a specified minimum period, of over four months, between the service of the first answer and the pretrial conference. [7] In this case, the district judge provided only 101 days between service of the first answer and the pretrial conference. This violation of the Local Rules was error. [8] Because the district judge's "rocket docket" policy violated the Local Rules, the Federal Rules of Civil Procedure were violated as well. Reversal was required

because the violation clearly prejudiced Martel's ability to prepare his case.

[9] Finally, Martel was under no obligation to provide the court of appeals with a trial transcript. The error of which Martel complained — the district court's denial of any continuance — was apparent from the face of the record.

[10] On remand, a new trial should be conducted following a sufficient period for discovery.

Circuit Judge Norris dissented, stating that Martel failed to carry his burden of showing trial prejudice because he failed to make any showing that the outcome might have been different had he been given an opportunity for further discovery.

COUNSEL

Thomas E. Beck, Los Angeles, California, for the plaintiff-appellant.

Douglas J. Collodel, Morris, Polich & Purdy, Los Angeles, California, for the defendants-appellees.

ORDER

The opinion and dissent filed April 12, 1994, 21 F.3rd 940 (9th Cir. 1994), are withdrawn. A new opinion and dissent are filed in their place, and the petition for rehearing and suggestion for rehearing en banc is dismissed as moot without prejudice.

OPINION

REINHARDT, Circuit Judge:

The district judge in this case is an exceptionally able, hard-working, and conscientious jurist. However, he enforces a procedure widely known as the "rocket docket." His standard practice is to set cases for trial within three months of the filing of the answer. He adhered to that policy in this § 1983 police brutality action. As a result, the plaintiff, Angel Martel, was forced to go to trial before he had any opportunity to conduct meaningful discovery. Martel appeals from the jury's verdict in favor of the defendants. Because we conclude that the district judge's refusal to grant any continuance constituted an abuse of his discretion, and because his enforcement of his "rocket docket" policy violated the Local Rules of the Central District of California, we reverse.

I.

Angel Martel was diagnosed as paranoid schizophrenic following a brain injury suffered in 1978. On June 6, 1990, while at his home in Pico Rivera, California, he experienced delusions that someone was attempting to break into his car. He took a shotgun and went into his backyard. Martel's brother-in-law, Henry Ortega, followed him into the yard and attempted to disarm him. In the struggle, the gun discharged without causing injury. Martel's wife, Ester, heard the shot and called 911 for assistance. Eight sheriff's deputies responded to the call and attempted to restrain Martel. Martel alleges that the deputies entered the backyard, removed the shotgun from the immediate area, and subdued him. He alleges that, after he surrendered, the deputies beat him with flashlights and batons, kicked him, and shocked him with a taser. Martel claims that the beating left him with a broken left kneecap and right leg, as well as head lacerations.

On April 22, 1991, Martel filed suit against the County of Los Angeles, the L.A. County Sheriff, one named deputy

sheriff, and several "John Doe" defendants. He sought damages under the federal civil rights statutes, as well as several state law causes of action. Two days after Martel filed his complaint, the district judge issued a copy of his standing order setting forth the procedures followed in his court. Although the local rules of the district court require a minimum of at least four months between service of the answer and a pretrial conference, the order stated:

> This court strives to set trial dates as early as possible and does not approve of protracted discovery. EXCEPT FOR UNUSUALLY COMPLEX CASES, COUNSEL SHOULD EXPECT THE CASE TO GO TO TRIAL WITHIN THREE MONTHS OF THE FILING OF THE FIRST ANSWER.

Order of April 24, 1991, at 3. To emphasize the point, the order went on to state that "[c]ontinuances are rarely granted.... The Court sets firm trial dates and will not change them except for emergencies." *Id.* The defendants filed an answer on May 17, thus starting the clock under the district judge's standing order.

Martel initiated discovery immediately after bringing the suit. Because he did not know the identities of seven of the eight deputies who had subdued him, he served the county with interrogatories accompanying the complaint. These interrogatories sought the names of all of the possible defendants. The county responded on May 24, although Martel claimed that it had not provided the names of all of the defendants and had misidentified one.

At a mandatory status conference on June 24, the district judge scheduled the pretrial conference for August 26, and the trial for August 27, just over three months after the defendants filed their answer. As his trial preparation continued, Martel eventually discovered the names of all eight of the deputies involved in his case. Accordingly, on July 22 and August 12,

he filed amended complaints, and eventually named seven additional deputies as defendants. Although he promptly served these new defendants with interrogatories and requests for admission, the responses to these requests were not due until after the August 27 trial date.

Because more time was necessary to complete essential discovery, Martel moved for a continuance on August 22. In addition to pointing out that the new defendants' responses to discovery requests were due only after the scheduled trial date, Martel's counsel claimed that the original defendants had not been cooperative in discovery. He stated that a motion to compel was pending and that it would likely not be heard until after the trial date. He also stated that he had been unable to depose any of the defendants because he was a sole practitioner and had been in trial nearly continuously since late May. The district judge denied the motion. Pursuant to the district judge's order, trial began on August 27, although Martel had not had an opportunity to depose *any* of the defendants. The jury returned a verdict in favor of the defendants. Because the jury determined that he had suffered no constitutional injury, the district judge dismissed Martel's *Monell*[1] claims against the county and Sheriff Block. Martel now appeals. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

A.

The decision to grant or deny a continuance lies within the district judge's discretion. However, this discretion "is not without limits." *Rios-Berrios v. I.N.S.*, 776 F.2d 859, 862-63 (9th Cir. 1985). In determining whether a district judge has abused his or her discretion in refusing to grant a continuance,

[1]See *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

our precedents require us to consider four factors: the appellant's diligence in attempting to prepare his case for the originally-scheduled trial date; the likelihood that the grant of a continuance would have resolved the problem which led the appellant to seek a continuance; the inconvenience a continuance would have caused the court and the opposing party; and the extent to which the appellant might have suffered harm as a result of the district court's denial. *United States v. 2.61 Acres of Land*, 791 F.2d 666, 671 (9th Cir. 1985) (citing *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir. 1985)). Although all of the *Flynt* factors must be weighed against one another, we will not reverse absent a showing of prejudice. *See id.*

[1] We conclude that the district judge abused his discretion in denying Martel a continuance and that this error requires reversal. Two of the *Flynt* factors clearly support our conclusion and require no extended discussion. First, it is clear that a continuance would have resolved the problem that impelled Martel to seek one. Martel moved for a continuance because he had not been able to depose *any* of the eight individual defendants, and because he had received responses to his written discovery requests from only one of them. Had the district judge moved back the trial date, Martel could have completed this necessary discovery. Second, a brief continuance for the completion of discovery would not have caused great inconvenience. Although any continuance might be said to cause some inconvenience, the defendants here could hardly have had a significant interest in proceeding to trial before they had responded to written discovery requests and been deposed. Nor is there anything in the record that shows that the work of the district court would have been disrupted by the delay. Moreover, even had such a showing been made, that would not affect our decision; for a continuance was necessary here only because of the district judge's decision to schedule the trial at a date that was too early to permit the parties to take reasonable discovery. It is also significant that the four month interval between the filing of the *complaint* and

the trial in this case was substantially shorter than that in the average case. In the Central District of California in 1991 and 1992, the median time between filing of the *answer* and trial in civil cases was *thirteen* months. *See* Administrative Office of the United States Courts, *1992 Federal Court Management Statistics* 129 (1992).

In denying the continuance, the district judge focused principally on the first *Flynt* factor: the extent of Martel's diligence in preparing for the scheduled trial date. In doing so, the judge ignored both the facts of this case and the realities facing individual plaintiffs in modern litigation. At the hearing on the motion for a continuance, the judge claimed that Martel's counsel was "very, very slow in getting a handle on this case." This statement apparently referred to the attorney's representation that he had calculated the exact amount of Martel's medical expenses for the first time earlier that afternoon. Yet, whether or not Martel's attorney was slow in calculating the damages (and we do not mean to suggest that he was), this issue was simply irrelevant to Martel's request for a continuance. Martel did not seek the continuance in order to evaluate evidence, such as the medical bills, which were already in his possession. By the time the judge heard the motion, Martel's counsel had already performed the necessary damage calculations, and there was no need to delay for this purpose. Rather, Martel sought the continuance in order to obtain information which was in the *defendants'* possession, and which the defendants were obliged to provide in discovery.

[2] Although the district judge also asserted that Martel had "not initiated discovery," the record shows this characterization to be incorrect. At the time Martel served his original complaint, he served the defendants whose identities he knew with interrogatories and requests for admission. He also filed timely requests for document production. As he began to learn the identities of the other individual defendants and add their names to the complaint, Martel served them with discovery

requests as well. Through no fault of Martel's, his motion to compel was not scheduled to be heard until after the trial date, and the responses of seven defendants to his discovery requests were not due until after trial either. To be sure, Martel had not deposed any of the defendants, but this was not the result of any lack of diligence on his part. Instead, it was the result of his attorney's quite busy trial schedule. As his attorney explained in a declaration in support of Martel's motion for a continuance:

> I have been unable to depose any of the defendants in large part due to the fact that I have been in trial in this Court between May 21, 1991 to June 25th, the Superior Court between July 8 and July 26th and in a municipal criminal case last week [8/13 to 8/16] I started a 1987 civil case that had been continued 5 times before Judge Marshall today and this is expected to go to the jury September 6.

Declaration of Thomas E. Beck, August 21, 1991, at 5 (brackets in original).

[3] It was improper for the district court to hold counsel's busy schedule against his client in this case. It is a basic reality of modern litigation that many plaintiffs, and especially those without financial means, must depend upon the assistance of attorneys with high-volume/low-margin practices if they are to have any skilled legal assistance at all. Many of these attorneys are sole practitioners. Plaintiffs therefore will sometimes be in the position in which Martel found himself here, having to compete with many other clients for his lawyer's time. By contrast, civil defendants (and especially large institutional clients like the County of Los Angeles) will normally not suffer from these problems. Defendants can usually engage firms with large rosters of attorneys and supporting staff. By virtue of the size of their business, many defendants can assure that counsel will place a priority on addressing *their* problems rather than those of other clients. Basic norms

of equitable treatment dictate that plaintiffs not be penalized simply because they are represented by sole practitioners who are legitimately engaged in other trials. Accordingly, where counsel's busy trial schedule is the primary reason for a delay in trial preparation, a continuance should generally not be denied in the absence of a prior warning, an exploration of the legitimacy of counsel's conflicting engagements and the extent to which an accommodation of counsel's schedule would prejudice the opposing party or inconvenience the court, and consideration of alternative solutions. Here, the district judge's insistence on its standard three-month interval between the filing of the answer and the trial without carefully exploring the factual circumstances of the case with the parties was inconsistent with his duty to treat plaintiffs and defendants equally. Given the extensive written discovery in which Martel's attorney had already engaged, the relatively short interval between the filing of the complaint and the trial, and the frenetic work schedule engaged in by Martel's attorney, it was an abuse of discretion for the district judge to refuse to allow him sufficient time to depose the defendants.

[4] Finally, we must consider the fourth *Flynt* factor, "the extent to which the appellant might have suffered harm as a result of the district court's denial." *Flynt*, 756 F.2d at 1359. In this case, the issue is easily resolved. The district judge's refusal to grant a continuance prevented Martel from deposing *any* of the defendants. The decision to force Martel to trial before he had received written discovery from seven of the defendants, and before he had deposed *any* of them, affected every aspect of the trial.[2] It manifestly prejudiced his ability to prepare and present his case. If Martel had obtained discovery from the defendants, he might well have been able to pur-

[2]We emphasize that this is not a case where the district court's error cut off only a comparatively insignificant amount of discovery. Martel had *no* opportunity to depose *any* of the defendants, and his requests for written discovery of the seven defendants added in his amended complaints would not come due until after trial.

sue additional investigative leads prior to trial. He might also have altered his plans for the presentation of his own witnesses and changed his strategy for cross-examining the county's. He might even have uncovered a new cause of action or a new theory on which he could prevail on one of his original claims. Most important, *there is no way we can know* how much of an impact the denial of discovery had on Martel's case. We simply cannot tell what kind of record he *could have developed* had he been able to obtain meaningful discovery. In such circumstances, we have recognized that it is both unfair and pointless to require a specific showing of the impact the district court's error had on the outcome of the proceeding. *See Hays v. Arave*, 977 F.2d 475, 479-81 (9th Cir. 1992). Martel has satisfied the prejudice requirement by showing that the district court's refusal to grant a continuance denied him meaningful discovery.

[5] An examination of our decision in *United States v. Lane*, 765 F.2d 1376, 1379 (9th Cir. 1985), makes clear that Martel has shown sufficient prejudice to warrant reversal. In *Lane*, a criminal defendant appealed the district court's refusal to grant more than a four-day continuance so that he could complete his trial preparation. We held that Lane had failed to show actual prejudice, for two reasons. First, we concluded that the four-day continuance gave Lane's counsel "adequate time prior to trial to review the statements of the government's witnesses." *Id.* Second, we noted that "Lane ha[d] not specified which witnesses his defense attorney would have interviewed, which documents and exhibits he was unable to examine, or what defenses he might have explored." *Id.*

In this case, Martel has shown precisely the elements of prejudice which we found lacking in *Lane*. First, unlike the district judge in *Lane* the district judge here did not grant Martel *any* continuance — even one of four days — to complete his trial preparation. Not only did Martel never have any opportunity to *review* the government witnesses' statements

prior to trial, he never even had the opportunity to *obtain any* statements. Second, and most important, Martel *has* "specified which witnesses his . . . attorney would have interviewed [and] which documents and exhibits he would have examined." Had the district judge granted the continuance, Martel would have deposed all of the individual defendants, and he would have examined the interrogatories and requests for admission which had been served on the seven new defendants but which would not come due until after the August 27 trial date. Although we do not know what kind of case Martel actually put on at trial, we do know that his preparation for that trial was manifestly prejudiced. That is clearly sufficient to meet the *Lane* requirement.

We conclude that the district judge abused his discretion by adhering to the "rocket docket" policy in the face of Martel's request for time to complete discovery. *Cf. Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) (stating that "a myopic insistence upon expeditiousness in the face of a justifiable request for delay" can constitute an abuse of discretion). Because the denial of meaningful discovery clearly prejudiced Martel, we reverse and remand for a new trial following a sufficient discovery period.

While we sympathize with the district court's attempt to control its docket, and believe that district judges must have wide discretion to do so, in this instance the strict policy of rushing cases to trial within three months of the filing of the first answer severely prejudices the ability of parties to prepare their cases, and often falls most heavily on those of limited means. We agree with the Fourth Circuit's admonition issued nearly three decades ago: "Delay should be avoided to the extent that it is unnecessary or unreasonable but adequate time must be allowed for discovery of the facts and assembly of the proof." *Freehill v. Lewis*, 355 F.2d 46, 48 (4th Cir. 1966).

B.

[6] There is another, independent basis for our conclusion that this case must be reversed. By setting the pretrial conference for approximately three months after the filing of the first answer, and setting the trial for the day after the conference, the district court violated the Local Rules of the Central District of California. These local rules provide for a specified minimum period (of over four months) between the service of the first answer and the pretrial conference. The district judge's standing order that "COUNSEL SHOULD EXPECT TO GO TO TRIAL WITHIN THREE MONTHS OF THE FILING OF THE FIRST ANSWER" conflicts squarely with the local rules.

[7] C.D. Cal. Local Rule (Civil) 6.1 states that the parties are to hold an early meeting "[w]ithin twenty (20) days after service of the answer by the first answering defendant." C.D. Cal. Local Rule (Civil) 6.2 requires submission of a report to the court "[w]ithin fourteen (14) days after the Early Meeting." The district court may send notice of the pre-trial conference "*no earlier than* sixty (60) days after the Joint Report of Early Meeting required by Local Rule 6 is due to be filed with the Court." C.D. Cal. Local Rule (Civil) 9.2 (emphasis added). The same rule states that "[t]he Pre-Trial Conference shall be set for a date *no earlier than* sixty (60) days after the mailing of such notice." *Id.* (emphasis added). These rules appear to provide for a minimum of 154 days between service of the first answer and the pre-trial conference. Even assuming the district judge had the authority to waive the Early Meeting and Joint Report requirements, as he purported to do here, the local rules still require a minimum of 120 days between service of the first answer and the pre-trial conference.[3] Here, the district judge provided only 101

[3]One of the district judge's standing orders purports to waive the early meeting report requirement. This is apparently a sua sponte action by the judge. *See* Order of May 31, 1991, at 1-2. However, Local Rule 9.11,

days between service of the first answer on May 17, 1991 and the pretrial conference on August 26, 1991. In doing so, he violated the Local Rules. This was error. When properly authorized and promulgated, local rules have the force of law. *See Weil v. Neary*, 278 U.S. 160, 169 (1929). Accordingly, they are "binding upon parties and upon the court that promulgated them until they are changed by a majority of judges of the district." 12 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 3153 at 224 (1973). Where a district court's violation of its local rules affects "substantial rights," 28 U.S.C. § 2111; *accord* Fed. R. Civ. P. 61, reversal is required.

[8] Moreover, when a district judge's standing orders conflict with local rules, the judge violates the Federal Rules of Civil Procedure as well. Under Fed. R. Civ. P. 83, which authorizes local rules, district judges "may regulate their practices in any manner not inconsistent with these [Fed. R. Civ. P.] rules or those of the district in which they act." Fed. R. Civ. P. 83; *see also* C.D. Cal. Local Rule (Civil) 30.3 ("If no parallel or analogy exists, then the Court may proceed in any lawful manner not inconsistent with these rules and the F. R. Civ. P."). This portion of Rule 83 was amended in 1985 "to make certain that standing orders are not inconsistent with the Federal Rules or any local district court rules." Fed. R. Civ. P. 83 1985 amendment advisory committee's note. The amendment was designed to preclude arbitrary action by individual judges in derogation of the rights afforded litigants by local court rules.[4] A "rocket docket" policy that affords parties

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which provides the procedures for waiver of the pretrial rules, appears by its terms to allow such waivers only if the parties request them. We need not determine whether the district judge validly waived the pretrial rules, however, because the 101-day interval between service of the answer and the pretrial conference in this case would have violated the local rules even if the district judge's purported waiver were effective.

[4]This is not a case where a district judge exercised his discretion to determine that, under all of the circumstances, a departure from the local

less time than they are entitled to under the local rules violates those rules and therefore Fed. R. Civ. P. 83 as well. Because the violation here clearly prejudiced Martel's ability to prepare his case, we must reverse.

III.

Because Martel failed to file a trial transcript in this court, the defendants argue that we must dismiss his appeal for violation of Fed. R. App. P. 10(b)(2). Martel did not violate Rule 10(b)(2) which states:

> If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such findings or conclusion.

By its terms, Rule 10(b)(2) does not impose a *general* obligation on *all* appellants to file a trial transcript in the court of appeals. It *only* imposes an obligation to file relevant excerpts from the transcript where resolution of the appellant's specific claims of error requires an examination of those particular parts of the transcript. Moreover, the rule on its face applies only where an appellant is challenging a specific finding or conclusion. Here, Martel is objecting to the very fact that the trial was held at the time it was, not to particular acts or omissions in its course.

Our cases have made clear that Rule 10(b)(2) does not impose a general obligation on appellants to furnish copies of

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rules would be "so slight and unimportant that the sensible treatment is to overlook [it]." *Allen v. United States Fidelity & Guaranty Co.*, 342 F.2d 951, 954 (9th Cir. 1965). Rather, it is a case where a district judge's standing order, enforced in every case, violates the local rules. This is precisely the situation the drafters of the 1985 amendment to Rule 83 sought to reach.

transcripts. *See, e.g., Syncom Capital Corp. v. Wade*, 924 F.2d 167, 169 (9th Cir. 1991). In *Syncom Capital*, Wade claimed on appeal both that the district court's findings of fact were insufficient under Fed. R. Civ. P. 52(a) and that they were clearly erroneous. Since resolution of these issues necessarily required an examination of the trial record, we dismissed the appeal because Wade failed to provide *any* of the trial testimony.[8] However, we made clear in *Thomas v. Computax Corp.*, 631 F.2d 139, 141 (9th Cir. 1980), that the appellant's burden was not to provide us with the *entire* transcript, but instead only to provide those parts of the transcript relevant to his claims. In *Thomas*, a woman appealed from a district court's rejection of her sex discrimination claim against a potential employer. On appeal, she challenged the district court's findings as inconsistent with the evidence but failed to include in the record any transcript of the district court proceedings. We concluded that Thomas had violated Rule 10(b) because she had "failed to designate and prepare as part of the record on appeal the witness' testimony *relevant to her contention* that the evidence was insufficient to support the trial court's finding and judgment." *Id.* (emphasis added). Although we specifically limited the appellant's obligation to one of "order[ing] the *necessary parts* of the record," we dismissed the appeal because Thomas had failed to provide *any* of the relevant portions of the transcript. *Id.* (emphasis added).

[8]See also *Southwest Administrators, Inc. v. Lopez*, 781 F.2d 1378, 1379-80 (9th Cir. 1986) (dismissing appeal where appellant challenged district court's findings of fact but failed to provide any part of the trial transcript); *cf. In re Ashley*, 903 F.2d 599, 603 n.1 (9th Cir. 1990) (refusing to consider whether an affidavit of nonservice undermined the district court's finding that a witness was unavailable where the appellant failed to include the affidavit in the record before the court of appeals); *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 877 F.2d 787, 789-90 (9th Cir. 1989) (refusing to consider claim in appeal from contempt citation that district court erred in finding that appellants acted in concert with named defendants and had actual knowledge of the injunction they violated where appellants failed to provide a transcript of the contempt hearing).

[9] Because Rule 10(b)(2) only requires an appellant to provide us with those *portions* of the transcript which are relevant to his claim of error, it imposes *no* obligation on him to provide us with *any* part of the transcript if "the error complained of on appeal" is "fully apparent on the face of the record on appeal." *United States v. Mills*, 597 F.2d 693, 698 (9th Cir. 1979). Martel's appeal is exactly the kind of case in which an appellant need not file a transcript, for the error of which he complains — the district court's denial of any continuance — is "fully apparent on the face of the record." Moreover, not only is the district court's *error* fully apparent even without a trial transcript, the *prejudicial effect* of that error is fully apparent as well.[6] The district court's erroneous denial of a continuance prevented Martel from deposing *any* of the defendants and also prevented him from receiving written discovery from seven of them. Because the lack of discovery affected the course of the trial in ways which we would never be able to determine even with a trial transcript, Martel was under no obligation to provide us with one.[7] Accordingly, we see no need to look past the district court's clear abuse of

[6]Because the harm resulting from the district court's error in this case is clear even without consulting the trial transcript, we need not consider whether Rule 10(b)(2) requires an appellant to provide portions of the transcript when the district court's *error* is apparent on the face of the record, but the *prejudicial effect* is not. We note, however, that under the plain language of Rule 10(b)(2) the appellant is only required to include a transcript of evidence relevant to the specific "finding or conclusion" he is challenging, and that Martel furnished us with a transcript of the hearing at which the continuance was denied. We also need not consider whether any other provision might under some circumstances require an appellant to provide us with a trial transcript for the sole purpose of demonstrating prejudice.

[7]We note that, had the defendants determined that portions of the trial transcript would have negated Martel's claim of error or prejudice, Rule 10(b)(3) provided them with the opportunity to file these portions with the court. We also note that, if a court considers it necessary to consult a portion of the transcript which the parties have not included in the record on appeal, it can order the parties, under Rule 10(e), to provide the court with that part of the transcript.

its discretion in forcing Martel to trial before he had a reasonable opportunity for discovery.

IV.

We also deny the defendants' request for sanctions and attorneys' fees. The request borders on the frivolous, for Martel's appeal clearly has merit. Sanctions are an extraordinary remedy. *Cf. Chambers v. NASCO, Inc.*, 111 S. Ct. 2123, 2132-33 (1991) (stating that the court's inherent power "to fashion an appropriate sanction for conduct which abuses the judicial process" must "be exercised with restraint and discretion"). They will not be granted — nor should they be sought — as a matter of routine. Moreover, a party should not seek sanctions when, as in this case, its adversary's position is clearly not frivolous. Parties who improperly seek sanctions, particularly repeat offenders, risk being subjected to sanctions themselves.

V.

[10] The judgment of the district court is REVERSED and the case is REMANDED for a new trial following a sufficient period for discovery. Because the district court's dismissal of Martel's *Monell* claims was predicated on the jury's verdict, the district court is instructed to reinstate those claims as well.

NORRIS, J., dissenting:

It is the law of our circuit that when a district court denies a continuance sought for the purpose of obtaining additional discovery, the complaining party must show actual and substantial prejudice to obtain a reversal on appeal.[1] *See Sablan*

[1]Because I believe Martel has failed to make the required showing of actual prejudice, I do not address whether the district court abused its discretion in denying Martel's motion for a continuance.

v. Dep't of Finance of N. Mariana Islands, 856 F.2d 1317, 1321 (9th Cir. 1988) (a court's "decision to deny discovery will not be disturbed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant.") (inner quotation marks omitted); *Butcher's Union Local No. 498 v. SDC Investment, Inc.*, 788 F.2d 535, 540 (9th Cir. 1986); *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977).[2]

While the majority purports to apply this standard, its analysis and conclusions make clear that it considers a denial of "meaningful discovery" to be presumptively prejudicial, regardless of what happens at trial. Majority Opinion at 10356. In effect, the majority buys Martel's argument that the denial of a continuance for the purpose of conducting further discovery was "inherently prejudicial." Appellant's Reply Brief at 11. In holding that Martel suffered "actual and substantial prejudice," the majority relies primarily on its own speculation about what might have happened at trial, without any showing from Martel as to how the discovery he was denied would have changed his presentation or the outcome at trial. "What might have been discovered had a continuance been granted is inadequate to establish prejudice." *United States v. Hernandez*, 608 F.2d 741, 746 (9th Cir. 1979)

In cases denying continuances, prejudice is measured in terms of the impact on the outcome of trial. *See, e.g., United States v. Flynt*, 756 F.2d 1352, 1362 (1985) (finding prejudice because the defendant was "not allowed to put forward the only defense he had"). *Cf. United States v. Hasting*, 461 U.S.

[2]In this case, as in *Sablan*, "a continuance was sought for the purposes of conducting discovery, and hence its denial was effectively a denial of discovery." 856 F.2d at 1321. *See also United States v. Lane*, 765 F.2d 1376, 1379 (9th Cir. 1985) (movant must show actual prejudice before a denial of a motion for continuance will be reversed); *United States v. Mitchell*, 744 F.2d 701, 705 (9th Cir. 1984) (same).

499, 506 (1983) (holding that trial court error is harmless (i.e. not prejudicial) when "there is no reasonable possibility that the [error] complained of might have contributed to the conviction"). A complaining party must specify the prejudice inflicted by the denial of a continuance. *See, e.g., United States v. Mitchell*, 744 F.2d 701, 704-5 (9th Cir. 1984) (finding no prejudice where defendant did not, *inter alia* "specify what defense theories his counsel might have explored"); *United States v. Lane*, 765 F.2d 1376 (9th Cir. 1985) (same).

Here, we do not know what kind of case Martel put on at trial because he has made no effort to tell us. For all we know, Martel's theory of the case is facially implausible and his evidence completely lacking in probative value. At the same time, the officers' version of the facts may have been completely plausible and fully supported by the testimony of non-party witnesses as well as the physical and documentary evidence.

In *Butcher's Union Local No. 498 v. SDC Investment*, 788 F.2d 535, 540 (9th Cir. 1986), we refused to find prejudice when the plaintiffs stated only that they "believe[d]" that discovery would enable them to demonstrate the court's personal jurisdiction over the defendants, but did not specify what theory of jurisdiction they intended to pursue. "This speculation," the court held, "does not satisfy the requirement that they make 'the clearest showing' of actual and substantial prejudice." *Id.* (quoting *Data Disc*, 557 F.2d at 1285 n.1).

Here, Martel makes no stronger showing to support his claim of prejudice. In fact, in his opening brief on appeal, Martel tells us nothing about the trial evidence, his theory of the case, or why additional discovery might conceivably have changed the jury verdict. Instead, he relies on statements such as this: "Denial of the motions to continue the trial and pretrial were indisputably prejudicial. *The adverse verdict alone is proof of that. . . .*" Appellant's Reply Brief at 11 (emphasis added).

My colleagues go astray by focussing on the impact of a denial of discovery on the discovery process. They offer nothing more than conjecture about the possible impact on the jury's verdict.[3] The majority concludes: "It is clear that all the discovery was highly relevant to the essential factual issue that divided the parties, and on which Martel would be required to prevail at trial."[4] The test, however, is not whether the discovery was relevant; the test is whether, given the trial evidence, there is any realistic reason to believe that additional discovery would have made any difference to the outcome. The majority fails to identify a single point of fact that was actually in dispute at trial where further discovery could actually have affected the outcome of the case.

On appeal, the burden is on Martel to make a showing of a reasonable likelihood that the denial of further discovery caused him "actual and substantial prejudice." *Sablan*, 856 F.2d 1321. He cannot carry that burden without telling us at least something about what happened at trial. Unfortunately for him, he chooses to tell us nothing about the trial evidence, nor the specific issues of fact in dispute, nor has he given any reason to believe that additional discovery might have changed the outcome at the trial. By failing to tell us anything about the trial, or to provide us with a trial transcript or even portions thereof, Martel fails to carry his burden of showing even a reasonable possibility that additional discovery would have changed the result of the trial. We know nothing about the kind of case Martel actually put on at trial because he has told us nothing.

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[3]Incidentally, Martel was not denied all discovery. In fact, from May 17, when the defendants filed their answer, until the trial on August 27, Martel conducted substantial discovery, which yielded answers to interrogatories and documents. He did not, however, take a single deposition even though he knew the identity of 6 of the 7 deputies involved in the incident as of June 24 when he was given notice of an August 27 trial date; by August 2, he knew the identity of the final deputy.

[4] The factual issue they are referring to concerns the amount of force utilized by the defendants.

Nonetheless, the majority excuses Martel from his burden of showing some likelihood that the outcome of trial would have been affected by the denial of further discovery, and instead relies on its own conjecture about what the trial *might* have been like. Giving only lip service to the law of the circuit, the majority basically adopts a structural rule that dispenses with the requirement that the defendant show trial prejudice in cases of a denial of a continuance sought for the purpose of conducting additional discovery.

"Structural" rules that presume prejudice from trial court error are the exception, not the rule. Generally, parties are required to show that trial court error was in fact prejudicial.[5] I see no justification for creating a *de facto* exception to the general rule for what the majority calls a denial of "meaningful discovery."[6] It is not unduly burdensome to require a party seeking reversal for a denial of discovery to tell us at least something about the disputed issues of fact and the trial evidence relevant thereto to help us make a judgment on the likelihood that additional discovery would have affected the outcome of the trial. Litigators routinely dissect a trial to find a basis for arguing that trial court error was prejudicial. In this case, for example, Martel at least could have tried to carry his burden by showing that the case turned on a battle of credibility between his witnesses and the officers, that the testimony on both sides was reasonably credible on its face, and that the outcome could easily have been different if he had been given the opportunity to probe for possible inconsistencies in the deputies' testimony in the informal, rel-

[5]*See* Fed. R. Civ. P. 61 ("[N]o error or defect in any ruling . . . is ground for . . . setting aside a verdict . . . unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

[6]The majority makes no attempt to give content to its "meaningful discovery" standard. Instead, it muddies up the legal waters by employing an elastic, vague, and ultimately meaningless phrase that will be the source of vexatious litigation in the future.

atively risk-free setting of depositions outside the presence of the jury. For our part, we routinely review such claims of trial prejudice despite their inherently speculative nature. But we cannot be expected to decide such issues without help from the party claiming trial court error. In this case, Martel has provided us with no help whatsoever. In sum, I see no basis in reason, experience, precedent, or the circumstances of this particular case for creating a discovery exception to the general rule requiring a party to demonstrate a likelihood that trial court error affected the outcome of the trial rather than presuming trial prejudice from a denial of a continuance to conduct further discovery.

Finally, the majority's reliance on *United States v. Lane*, 765 F.2d 1376 (9th Cir. 1985), as setting the standard of prejudice, is misplaced. *See* Majority Opinion at 10363-10364. In *Lane*, we held that the defendant failed to show actual prejudice because he "ha[d] not specified which witnesses his defense attorney would have interviewed, which documents and exhibits he was unable to examine, or what defenses he might have explored." *Id.* The majority cites *Lane* as authority that Martel has carried his burden of showing prejudice simply by identifying witnesses he wanted to depose and documents he wanted to examine. But the majority overreads *Lane*. *Lane* merely holds that in failing to specify *any* witnesses, documents or theories he would have pursued on discovery, he failed to make the required showing of prejudice. *Lane* cannot be read as authority for the logically different proposition that Martel carried his burden of showing prejudice merely by identifying some witnesses he wanted to depose and some documents he wanted to examine. In other words, making a better case than the defendant made in *Lane* is a necessary, but certainly not a sufficient condition to making the showing of prejudice required to get a new trial. *Lane* tells us only what constitutes an insufficient showing of prejudice; it is not authority that Martel made a sufficient showing.

In sum, Martel has failed to carry his burden of showing trial prejudice because he has failed to make any showing that

the outcome might have been different had he been given an opportunity for further discovery. He tells us nothing about the trial except that he lost. He makes the preposterous argument that the "adverse verdict alone is proof" that the denial of the continuance was prejudicial. Appellant's Reply Brief at 11. That, of course, is not and cannot be the law. If it was, every trial court error would *per se* be prejudicial to the losing party.

Nonetheless, my colleagues bail Martel out by engaging in baseless speculation about what might have happened at trial had he been given time for additional discovery. In effect, the majority has created a structural rule that presumes prejudice whenever there is a denial of "meaningful discovery" — a standard the majority infuses with no content. I dissent.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RECEIVED
JUN - 4 1995
THE LAW OFFICES OF
DOUGLAS E. BECK & ASSOC.

ANGEL MARTEL,
Plaintiff-Appellant,

v.

COUNTY OF LOS ANGELES; ELIAS CUEVAS; HARRY DELONG; RICHARD MARIADIAGA; MARK SHAUGHNESSY, et al.,
Defendants-Appellees.

No. 91-56268

D.C. No.
CV-91-2164-SVW

OPINION

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted—April 7, 1993

Decided April 12, 1994

Order Granting Rehearing En Banc
Filed November 14, 1994

Argued and Submitted
January 19, 1995—Pasadena, California

Filed June 1, 1995

Before: J. Clifford Wallace, Chief Judge, Betty B. Fletcher, Cecil F. Poole, Dorothy W. Nelson, William C. Canby, Jr., Stephen Reinhardt, Robert R. Beezer, Charles Wiggins, Melvin Brunetti, Pamela Ann Rymer, and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Beezer; Concurrence by Judge Canby; Dissents by Judge Kleinfeld, Judge Reinhardt, and Judge Fletcher

SUMMARY

Civil Litigation and Procedure/Discovery/Trials

The court of appeals affirmed a district court judgment. The court held that a party appealing the denial of his motion for continuance for purposes of conducting discovery failed to meet the required showing of "actual and substantial prejudice," where he made no effort to indicate what facts would have been gained from additional discovery and why the facts would have affected the result of the trial.

Appellant Angel Martel filed a civil rights action against appellees the County of Los Angeles and sheriff's deputies (collectively, the County). The complaint was based on various claims of police brutality and the use of excessive force. Four days before the pretrial conference was set to begin, Martel filed an ex parte application to continue the trial date. The district court denied his motion, and the trial proceeded on schedule. The jury returned a verdict in favor of the deputies. The court dismissed Martel's claims against the County and the Sheriff.

Martel appealed, contending that the trial court's denial of his motion to continue the trial in order to conduct additional discovery was an abuse of discretion. A divided panel of the court of appeals reversed, holding that Martel was entitled to a new trial. A majority of the active, nonrecused judges of the court of appeals voted to rehear the case en banc.

[1] The law of the Ninth Circuit is that "actual and substantial prejudice to the complaining litigant" is required to dis-

turb a district court's decision to deny or grant a continuance to conduct discovery. The complaining party bears the burden to make the "clearest showing" of actual and substantial prejudice.

[2] In this case, Martel's failure to demonstrate actual and substantial prejudice was total. He provided no transcript of the events that transpired at trial. [3] Moreover, he did not state what facts he would have gained from the deputies that would have advanced his cause at trial. [4] Martel did not speculate as to what he would have discovered, nor did he explain how that discovery would have altered the result at trial. [5] Martel failed to meet the required showing of actual and substantial prejudice because he made no effort to indicate what, if any, facts would have been gained from additional discovery and why, if at all, these facts would have affected the result of the trial.

Circuit Judge Canby, joined by Circuit Judge D.W. Nelson, concurred in the judgment, but took issue with the majority's formulation of the requisite showing of "actual and substantial prejudice."

Circuit Judge Kleinfeld, with whom Judges Fletcher and Reinhardt concurred, dissented, stating that Martel demonstrated substantial and actual prejudice as the term had traditionally been understood in the context of review of denials of continuances, and noting that cutting the time from answer to trial to three months was not worth the burden it imposes on justice.

Circuit Judge Reinhardt dissented, stating that Judge Kleinfeld's dissent effectively disposed of the majority's reasoning.

Circuit Judge Fletcher dissented, suggesting that it was important to a proper analysis and understanding of the district court's role to decide whether the trial judge abused his discretion in denying the continuance.

COUNSEL

Thomas E. Beck, Los Angeles, California, for the plaintiff-appellant.

Douglas J. Collodel, Morris, Polich & Purdy, and Robert S. Wolfe, Manning, Marder & Wolfe, Los Angeles, California, for the defendants-appellees.

OPINION

BEEZER, Circuit Judge:

We consider whether a district court's denial of a motion for continuance for purposes of conducting discovery is reversible absent an affirmative demonstration of actual and substantial prejudice to the moving party. Angel Martel appealed the pretrial denial of a continuance following an unfavorable jury verdict in his civil rights action against the County of Los Angeles and eight individual law enforcement officers. We have jurisdiction. 28 U.S.C. § 1291 (1988 & Supp. V 1993). Initially, a divided panel reversed the district court, holding that Martel was entitled to a new trial. *See Martel v. County of Los Angeles*, 34 F.3d 731 (9th Cir. 1994). A majority of the active, nonrecused judges of this court voted to rehear the case en banc. *Martel v. County of Los Angeles*, No. 91-56168, slip op. 14025 (9th Cir. Nov. 14, 1994); Fed. R. App. P. 35(a); 9th Cir. R. 35-3.

Because we conclude that Martel failed to establish the necessary actual and substantial prejudice from the denial of his motion for a continuance to conduct additional discovery, we affirm the district court.

I

On June 6, 1990, deputies from the Los Angeles County Sheriff's Office arrived at the residence of Angel Martel. They were responding to an emergency telephone call from his wife, Ester Martel. When the deputies arrived, Angel Martel, a paranoid schizophrenic, was in the backyard holding a firearm. The deputies subdued Martel through the use of force. Martel suffered serious injuries during the struggle.[1]

Martel filed a civil rights action on April 22, 1991 against the County of Los Angeles and an unspecified number of sheriff's deputies (collectively "County"). *See* 42 U.S.C. §§ 1983, 1985 (1988 & Supp. V 1993). The complaint was based on various claims of police brutality and the use of excessive force. Initially, the complaint named only the County, the Sheriff, and one deputy.

On May 6, 1991, Martel served interrogatories on the County, which requested, among other things, the names of the deputies who participated in the incident at the Martel residence. The County responded on May 24, 1991, naming seven deputies who were at the scene.

The district court entered an order on May 31, 1991, setting the date of a mandatory status conference for June 24, 1991. At the status conference, the court set the trial date for August 27, 1991, with a pretrial conference to begin one day earlier. Although Martel made several efforts to extend the discovery

[1]Our recitation of the facts is limited because of the sparse record on appeal. Because we are not in possession of any record from the trial, we obtained a brief set of facts from Martel's complaint and documents in the Clerk's Record. The "Defendant's Trial Brief" in the Clerk's Record does indicate that most of the events that occurred at the Martel residence were not disputed, but rather it was the necessity and propriety of the force used that was the primary issue at trial. Nevertheless, we do not know what transpired, or what evidence was produced, at trial. As we note later, the lack of a proper record is a problem throughout this entire appeal.

cut-off date, he did not move during June or July for a continuance of the trial date. Martel did file a first and second amended complaint, which reflected the names of additional sheriff's deputies.[2]

On August 22, 1991, four days before the pretrial conference was set to begin, Martel filed an ex parte application to continue the trial date. The district court denied Martel's motion, and the trial proceeded on schedule. Following a three-day trial, the jury returned a verdict in favor of the eight sheriff's deputies. The district court then dismissed Martel's claims against the County and the Sheriff, who were the only remaining defendants.

Martel appeals. He does not argue that any error was committed during the trial. Rather, he argues that the trial court's denial of his motion to continue the trial in order to conduct additional discovery was an abuse of discretion. Martel contends that he was prevented from deposing critical witnesses and otherwise adequately preparing for trial. Martel requests a new trial on his civil rights claims.

II

As we have observed, a district court's decision to deny a continuance sought for the purposes of obtaining discovery will be disturbed only "upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant." *Sablan v. Department of Fin.*, 856 F.2d 1317, 1321 (9th Cir. 1988); *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986); *Data Disc, Inc. v. Systems Technology Assocs., Inc.*, 557 F.2d 1280,

[2]In his initial complaint, Martel named only one deputy, Cuevas. In the first amended complaint, filed July 23, 1991, Martel named six more deputies, DeLong, Mariadiaga, Shaughnessy, Howland, Lammers and Yanes. In the second amended complaint, filed August 12, 1991, Martel named one final deputy, Robles.

1285 n.1 (9th Cir. 1977). We limit our opinion to the question of actual and substantial prejudice. We need not, and do not, address whether the district court abused its discretion in denying Martel a continuance to conduct discovery.[3] Even if the district court had abused its discretion, such an error is not reversible absent the clearest showing of actual and substantial prejudice.

We have recognized on many occasions the importance of a showing of actual and substantial prejudice in the context of denials of continuances. *Sablan*, 856 F.2d at 1321; *Butcher's Union*, 788 F.2d at 540; *United States v. 2.61 Acres of Land*, 791 F.2d 666, 671 (9th Cir. 1985); *United States v. Flynt*, 756 F.2d 1352, 1359 (9th Cir.), *amended*, 764 F.2d 675 (9th Cir. 1985); *United States v. Mitchell*, 744 F.2d 701, 704-05 (9th Cir. 1984); *United States v. Maybusher*, 735 F.2d 366, 369 (9th Cir. 1984), *cert. denied*, 469 U.S. 1110 (1985). As these decisions indicate, a showing of prejudice is necessary to obtain reversals of decisions on continuance motions in both civil and criminal contexts. Prejudice is measured in terms of the outcome of the trial; in other words, is there a reasonable probability that the outcome would have been different had the continuance been allowed.

[1] We reaffirm these holdings today. The law of this circuit is that "actual and substantial prejudice to the complaining litigant" is required to disturb a district court's decision to deny or grant a continuance to conduct discovery. *Sablan*, 856 F.2d at 1321. The complaining party bears the burden to make the "clearest showing" of actual and substantial prejudice. *Id.*

[3]The determination whether a denial of a continuance constitutes an abuse of discretion depends on a consideration of the facts of each case. *United States v. Flynt*, 756 F.2d 1352, 1359 (9th Cir.), *amended*, 764 F.2d 675 (9th Cir. 1985). We leave for another day, and another set of facts, the question whether the denial of a continuance in a similar context would constitute an abuse of discretion.

Having established the standard we will employ to review the district court's denial of a continuance to conduct discovery, we now apply that standard to the facts before us. Martel argues that he was unable to depose the sheriff's deputies who subdued him. He contends that the lack of discovery was detrimental to the preparation of his case. Indeed, Martel argues that the lack of opportunity to "complete *essential discovery*" caused prejudice. We disagree.

[2] Martel's failure to demonstrate actual and substantial prejudice is total. He provided no transcript, not even an abbreviated one, of the events that transpired at trial. Absent the complete record, or at least the relevant portions, it is difficult to even begin to gauge what prejudice arose from the trial court's denial of a continuance. We can only guess at the issues in dispute at trial, the direct testimony of the sheriff's deputies and the extent of cross-examination of the deputies. Perhaps more discovery would have revealed lines of attack on the deputies' credibility or inconsistencies in their recollection, but we are speculating idly. To quote Judge Norris' dissenting opinion to the panel decision:

> [Martel] cannot carry that burden [of showing actual and substantial prejudice] without telling us at least something about what happened at trial. Unfortunately for him, he chooses to tell us nothing about the trial evidence, nor the specific issues of fact in dispute, nor has he given any reason to believe that additional discovery might have changed the outcome of the trial. By failing to tell us anything about the trial, or to provide us with a trial transcript or even portions thereof, Martel fails to carry his burden of showing even a reasonable possibility that additional discovery would have changed the result of the trial. We know nothing about the kind of case

> Martel actually put on at trial because he has told us nothing.

Martel, 34 F.3d at 740.

[3] Even assuming Martel had submitted a full or partial transcript, he still does not tell us what facts he would have gained from the deputies that would have advanced his cause at trial. Although we recognize the potential importance of deposing the deputies, Martel does not elaborate on how additional discovery would support whatever arguments he advanced at trial. We are unwilling to engage in ruminative speculation on this subject. Indeed, our precedents will not permit it. *Sablan* requires "actual and substantial" prejudice. Martel fails to meet this standard.

Our decision in *United States v. Lane*, 765 F.2d 1376 (9th Cir. 1985) is in accord with this application. In *Lane*, we held that an appellant failed to show actual prejudice when he did not specify which witnesses he would have interviewed, which documents he wanted to examine or which defenses he would have explored. We did *not* say, however, that merely designating a witness, document, or defense that a party proposes to investigate through discovery demonstrates prejudice. *Lane* provides an example of what is an insufficient showing, but does not establish what constitutes a sufficient showing.

[4] More closely on point is our decision in *Butcher's Union*, 788 F.2d at 540-41. In that case, the complaining party speculated that discovery would enable it to demonstrate sufficient business contacts to establish personal jurisdiction over a defendant. *Id.* at 540. We determined that this speculation was not sufficient to make the "clearest showing" of actual and substantial prejudice. *Id.* Here, Martel failed to meet even this insufficient level of speculation. Martel did not speculate as to what he would have discovered, nor did he explain how that discovery would have altered the result at trial.

Martel's argument that the "adverse verdict alone is proof" that the denial of a continuance was "indisputably prejudicial" demonstrates a fundamental misperception of the law. If the fact that a party lost at trial was indisputable proof that adverse pretrial rulings were prejudicial, we would be reversing jury verdicts at an uncomfortably high rate. Indeed, as Judge Norris aptly noted in his dissent to the original panel's opinion, Martel's argument is "preposterous" because, if it were true, "every trial court error would *per se* be prejudicial to the losing party." *Martel*, 34 F.3d at 741.

We also reject the argument that because the discovery denied to Martel was arguably meaningful, the denial was either inherently prejudicial, or that a lesser quantum of prejudice need be demonstrated. As Judge Norris correctly observed, "[i]t is not unduly burdensome to require a party seeking reversal for a denial of discovery to tell us at least something about the disputed issues of fact and the trial evidence relevant thereto to help us make a judgment on the likelihood that additional discovery would have affected the outcome of the trial." *Martel*, 34 F.3d at 741. That requirement is no less important merely because a witness is deemed significant to a party's case at trial. Of course, if the complaining party is denied significant discovery or is unduly restricted in discovery matters by the district court or the opposing party,[4] actual and substantial prejudice from the denial of a motion for a continuance might be easier to demonstrate, but that does not relieve the complaining party from the obligation of demonstrating it.

[5] This case does not present us with the opportunity to detail exactly what level of prejudice qualifies as "actual and substantial." We need go no further than to hold that Martel

[4]If the complaining party believes that the opposing party is being intransigent on discovery issues, the complaining party has the option of moving pursuant to Fed. R. Civ. P. 37 to compel discovery or to obtain sanctions.

failed to meet the required showing of actual and substantial prejudice because he made no effort to indicate what, if any, facts would have been gained from additional discovery and why, if at all, these facts would have affected the result of the trial.

To conclude, we hold that Martel has failed to establish actual and substantial prejudice to his cause which occurred on account of the district court's denial of his motion for a continuance to conduct discovery. Martel's failure to tell us with any clarity what facts he would have discovered, specifically from deposing the sheriff's deputies, and his failure to provide us with the record of what transpired at trial fall short of the level needed to convince us that the result at trial might have been different had the continuance been granted. We will not disturb the district court's decision.[6]

III

The original panel opinion in this case addressed an issue not raised by either party, specifically, whether the district court violated provisions of the Local Rules of the Central District of California. We decline to address this issue, as it was not raised either before the district court or in the parties' briefs before this court. *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 901 (9th Cir. 1994) (we will not address issues on appeal that are not properly raised before the district court); *Abela v. Gustafson*, 888 F.2d 1258, 1266-67 (9th Cir. 1989) (same).

Part II.B. of the panel opinion, 34 F.3d at 736-37, is withdrawn and does not constitute the law of this circuit.

[6]Because we reject Martel's argument, we need not address the County's contention that Martel violated Fed. R. App. P. 10(b)(2), which requires an appellant to include in the record a transcript of all evidence relevant to any finding or conclusion that he or she believes is unsupported by the evidence.

IV

In its brief, the County requested attorney's fees and sanctions on the ground that Martel's appeal was frivolous. *See* Fed. R. App. P. 38. The County also requested attorney's fees as a prevailing party. *See* 42 U.S.C. § 1988. At oral argument before the en banc court, the County waived its requests for fees and sanctions. We accept that waiver.

AFFIRMED.

CANBY, Circuit Judge, joined by D.W. NELSON, Circuit Judge, concurring in the judgment:

I concur in the result reached by the majority, but like Judge Kleinfeld, I take issue with the majority's formulation of the requisite showing of "actual and substantial prejudice."

Judge Kleinfeld is quite correct in stating that Martel cannot be expected to show what facts he would have discovered if he had been given time to depose the defendant deputies. As its name implies, "discovery" is the process of learning that which is previously unknown. It is therefore unrealistic for the majority opinion to require Martel to show "what, if any, facts would have been gained from additional discovery." I also share Judge Kleinfeld's concerns with the "rocket docket."

On the other hand, I agree with Judge Beezer that we cannot assess the denial of an opportunity for discovery in a total vacuum. We must pay *some* attention to the possible effect on the outcome of the trial. *See Martel v. County of Los Angeles*, 34 F.3d 731, 739 (9th Cir. 1994) (Norris, J., dissenting). Thus, I would require Martel to show that the denial of an opportunity to depose the defendant deputies might reasonably have had an effect on the outcome of his trial. When the denial of

discovery is potentially as central as the denial of an opportunity to depose the defendant deputies in this case, that burden should not be difficult to bear.

Martel, however, has given us nothing. We have no way of knowing the content of the deputies' testimony, or whether that testimony loomed large in the trial. We do not know whether Martel's own witnesses destroyed his case. Basking in total ignorance of events at the trial, I am unable to say that the denial of a continuance caused Martel actual and substantial prejudice. I therefore concur in the result reached by the majority.

KLEINFELD, Circuit Judge, dissenting, with whom Judges Fletcher and Reinhardt concur:

I respectfully dissent.

Federal Rule of Civil Procedure 1 specifically states that the rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. Sometimes serving one purpose tends to disserve another. For example, it is typical of bicycle engineering that one tries to build a lightweight, inexpensive, sturdy frame. But the better one serves any two goals, the worse one serves the third. Because the Federal Rules of Civil Procedure build pretrial practice around discovery, one cannot go too far toward one of the three desiderata, "just, speedy, and inexpensive," without sacrificing one or two of the others. By requiring a showing of prejudice which is, as a practical matter, impossible, we unreasonably disable ourselves from reviewing whether denial of a continuance is an abuse of discretion.

I. FACTS

The declarations of counsel in district court and the pretrial materials set out facts, though there is some contradiction.

They appear to be as follows. Angel Martel is a paranoid schizophrenic. On June 6, 1990, the day of his violent confrontation with the police, he may have been suicidal, or he may have had a delusion that people were tampering with his car in order to kill him. For whatever reason, he went into his yard with a loaded shotgun. His wife persuaded their relative, Mr. Ortega, to go into the yard and try to take the gun away from him. The gun went off, fortunately harmlessly, as Mr. Ortega tried to get it away from Mr. Martel. When Mrs. Martel heard the blast, she called the police. Eight sheriff's deputies responded to the call. Mr. Ortega may or may not have separated Mr. Martel from the shotgun by the time the deputies arrived. They unsuccessfully tried to get Mr. Martel down with a Taser, then piled on top of him to get him under control. In the course of this, they broke one of his legs and the kneecap on the other. He also required two sets of stitches to his head. His medical expenses ran close to $50,000.

Martel's attorney, Thomas Beck, filed this § 1983 action against the County of Los Angeles, Sheriff Sherman Block, one named deputy, and all the other deputies under the aliases of Does 1-50. The gist of the complaint is that the deputies used an unconstitutionally excessive amount of force in the course of the arrest. There are other claims as well.

Mr. Beck did not know whom to sue. By chance, he had the name and badge number of the one deputy he named. He believed, no doubt based on the Martels' perceptions and recollections, that about fifteen deputies were involved, so he sent interrogatories with his complaint asking for the names and addresses of all the deputies involved. The County answered the complaint on May 17, and identified seven deputies in timely answers dated May 24 and received by plaintiff's counsel May 29. Another deputy's identity was provided to plaintiff's counsel August 2. Plaintiff's counsel sent interrogatories and requests for production for the sheriff's department Internal Investigation Bureau file on the incident and other material July 3. Various discovery disputes arose

regarding how much of the Internal Investigation Bureau report and personnel files were properly discoverable. Counsel for both sides stipulated to a resolution of the most important dispute on August 2. The defendants agreed to provide the tape recordings of witness statements, transcripts of witness statements, and the Internal Investigation Bureau Report. After going through the material, plaintiff's counsel advised defense counsel by letter that the table of contents, taser report, disposition sheet, unit commander's recommendation, and pages 3, 4 and 32 were missing, and pages 3, 5, 9, 10 and 11 were illegible. It is not clear whether he ever got these materials.

The backdrop for all of this typical discovery skirmishing was the district court judge's standing order regarding the timing of cases. The district judge's order was sent out as soon as the complaint was filed and said trial would be held in three months:

> **EXCEPT FOR UNUSUALLY COMPLEX CASES, COUNSEL SHOULD EXPECT THE CASE TO GO TO TRIAL WITHIN THREE MONTHS OF THE FILING OF THE FIRST ANSWER.**

Plaintiff's counsel saw early on that this would be a problem. Part of the problem was that paper discovery — interrogatories and requests for production — needed more time. Also, plaintiff's counsel's time was very fully committed to other trials during the summer of 1991. On July 12, 1991, he moved for an extension of time for discovery, and for shortened time on his motion to amend to add the additional deputies as defendants. The court heard the motion July 22, granted the motion to amend, and set a hearing for August 2 on the motion to compel discovery.[1]

[1]This is the motion resolved by stipulation, as described above.

On the eve of trial, both sides were unprepared to try the case. Plaintiff's counsel moved on August 22 for a continuance until October or November, and on August 26 filed a motion to compel discovery. He filed a declaration that he had not deposed any of the deputies yet, because some had just recently been identified, and he had been in trial in other cases from May 21 to June 25, from July 8 to 26, and from August 13 to 16.

Defense counsel was not ready either. She moved for bifurcation, which implied continuance, of trial of the damages part of the case, and of the claims against the County and the Sheriff. She said she had just learned from plaintiff's counsel that medical expenses were over $48,000. Evidently she was surprised to discover how large the special damages for medical expenses would be, and was not prepared to try the damages part of the case because she had not yet done the necessary discovery. She declared that she had not yet deposed plaintiff's doctors or retained medical expert witnesses for the defense.

The defense motion was granted, but plaintiff's motion for continuance was not. The case went to trial on liability alone (not damages) against the deputies who participated in the arrest. The clerk's list of exhibits and witnesses shows that Mr. Martel's attorney called Mr. and Mrs. Martel, Mr. Ortega, and the eight sheriff's department officers whose names he had finally obtained. He played a tape of an interview with the deputy whom he named in the first iteration of the complaint. Mr. Martel's attorney had not had an opportunity to depose any of the deputies, for reasons set out more fully below.

Mr. Beck served the first set of interrogatories May 6, the day the County of Los Angeles was served, asking for the names of the unknown deputies. The County responded with some but not all the names May 24. Mr. Beck asked Ms. Shen, the County's lawyer, to stipulate to an amendment of the complaint substituting the names for his John Doe desig-

nations, but she refused. Mr. Beck was in trial in another case until June 25. He moved to shorten time and for leave to amend July 12, and the court granted these motions July 22. Mr. Beck pressed for more information, and got the last name August 2.

Until the court granted leave to amend on July 22, which allowed the new defendants to be joined and served, Mr. Beck could not under Federal Rule of Civil Procedure 33 serve paper discovery on them. He accomplished service of process and paper discovery on them July 30. The last deputy was added by a second amended complaint August 12.

The newly served deputies had 45 days to respond to paper discovery, under the version of Rule 33(a) then in effect. This 45 day period meant that the paper discovery from the deputies, except for the one whose name Mr. Beck knew when he filed suit in April, did not become due until *after* the August 27 trial. The critical paper production from the County, the Internal Investigation Bureau report, was not made until August 2, and it left Mr. Beck short the illegible and omitted pages. That production was made pursuant to the County's stipulation in response to Mr. Beck's motion to compel.

The practical result of this timetable was that Martel's lawyer was required to question the deputies under oath for the first time at trial, in front of the jury. Mr. Beck's busy trial schedule during the summer, the delay between when suit was filed and when Mr. Beck found out what deputies had been involved in the arrest, Mr. Beck's strategy of seeking the paper discovery before deposing the deputies, and the extraordinarily short interval between filing of suit and trial, all worked together to prevent depositions.

The jury decided that none of the deputies had violated Mr. Martel's rights by using unreasonable or excessive force. There is no way to tell what would have happened, had the deputies been required to give their account under oath twice,

once prior to trial in depositions. In depositions, unlike in examinations at trial, lawyers can afford the risk of asking questions to which they do not know the answers.

II. ANALYSIS

Plaintiff appeals on the sole ground that the district court abused its discretion by denying the plaintiff's motion for a continuance. The majority declines to reach the question of whether the court abused its discretion, for the reason that appellant has not demonstrated "actual and substantial prejudice" from the denial of the continuance. I respectfully disagree with the majority's interpretation of what "prejudice" means in this context. The majority thinks it means a showing that the outcome of the case would have been different, had the continuance been granted. I think it means that a party was precluded by the shortness of time from collecting material evidence or locating material witnesses.

A. The Local Rules

Plaintiff's counsel had a right to expect more than three months from answer to trial, when he accepted the Martel case. In the Central District of California in 1991 and 1992, the median time from filing of the answer to trial in civil cases was thirteen months. *See* Administrative Office of The United States Courts, *1992 Federal Court Management Statistics* 129 (1992).

Under the Local Rules, plaintiff's counsel could count on a minimum of five months. Rule 6.1 states that "[w]ithin twenty (20) days after service of the answer by the first answering defendant, and thereafter as each defendant answers, counsel for the parties shall meet in person . . ." C.D. Cal. Local Rule (Civil) 6.1. Within fourteen days after holding this meeting, "those attending are mutually obligated to file a Joint Report of Early Meeting . . . ." C.D. Cal. Local Rule (Civil) 6.2. Rule 9.2 builds in a minimum of four months

between the "Joint Report" of counsel and the pretrial conference:

> *Pre-trial calendar.* The Court may cause the notice for a Pre-Trial Conference to be sent to the parties on a date *no earlier* than sixty (60) days after the Joint Report of Early Meeting required by Local Rule 6 is due to be filed with the Court. The Pre-trial Conference shall be set for a date *no earlier* than sixty (60) days after the mailing of such notice.

C.D. Cal. Local Rule (Civil) 9.2 (emphasis added).

The majority does not consider the effect of the local rules, because they were first raised in our prior opinion in this case, at 34 F.3d 731, not by the parties. The issue, though, is not whether the denial of the continuance should be reversed because the pretrial order violated the local rules. The issue in this case should be whether the district court abused its discretion, and has narrowed down to whether the appellant has demonstrated substantial and actual prejudice. The framework in which discretion was exercised was provided by the Federal Rules of Civil Procedure and the Local Rules of the Central District of California. We cannot ignore the Local Rules. The Local Rules, adopted pursuant to Federal Rule of Civil Procedure 83, are laws of the United States. *United States v. Hvass*, 355 U.S. 570, 575 (1958). We are required to use our full knowledge of the law, whether the parties cite it or not. *Elder v. Holloway*, 114 S. Ct. 1019, 1023 (1994). The minimum time period of five months provided by the rules, and the median time of thirteen months from answer to trial, provide useful measures of minimum and ordinary times for discovery and trial preparation.

B. Prejudice

I disagree with the meaning attributed by the majority to the term "prejudice" in the context of review of denial of a

continuance. If we apply the meaning of "prejudice" in our precedents to the facts demonstrated by the record, as we should, prejudice is demonstrated in this case.

The majority concludes that Martel has to show "what facts he would have gained from the deputies that would have advanced his cause at trial." Majority at page 5993. Beyond advancing his cause, Martel would also have had to show, to gain reversal under the majority opinion, "what, if any, facts would have been gained from additional discovery and why, if at all, these facts would have affected the result of the trial." Majority op. at page 5995.

That is asking too much. It is too much to allow for any real review on appeal, and it is too much to reconcile with our previous decisions. Of course plaintiff cannot show what he would have gained from the discovery and how it would have affected the result at trial. He never got a chance to do the discovery, so he cannot know.

Plaintiff's lawyer represented an insane man who had been hurt in a violent confrontation with the police. Presumably Mr. Martel, his wife, and his brother-in-law thought the police had been more violent than necessary, and told their lawyer what they recalled of what they had perceived. If plaintiff's counsel called all the deputies to the witness stand and asked them if they had used more force than necessary, it was unlikely that their recollections of their perceptions of the incident would be the same as those of Mr. and Mrs. Martel and Mr. Ortega. One practical strategy was to get any reports showing what the deputies had said about the incident before, and then depose one or several of the deputies, or perhaps all of them. If all their deposition testimony appeared to be substantially consistent with other evidence and with each others' testimony, and to support the defense, then plaintiff's counsel might have sought a low settlement or dismissal of the lawsuit. But if one of the deputies, in deposition, told a different story from what he or she had said in the Internal Investiga-

tion Bureau report, or from another deputy, or said that another deputy had gone too far, then plaintiff's counsel might develop this into his liability case at trial. Without the continuance, there were no depositions, and evidently, as the jury saw it, there was no case.

Our precedents do not support the construction the majority has imposed on the term "prejudice" in this context. If we adhere to precedent, as I think we should, prejudice in the context of denial of a continuance means an inability to collect material evidence or locate material witnesses. It does not mean facts which would have been obtained and would have affected the outcome.

In *United States v. Maybusher*, 735 F.2d 366 (9th Cir. 1984), *cert denied*, 469 U.S. 1110 (1985), we affirmed a denial of a continuance. We held that prejudice was not demonstrated, because appellant "refers neither to an inability to collect evidence nor to difficulty in locating witnesses." *Id.* at 370. In the case at bar, by contrast, appellant claimed exactly these kinds of prejudice. In his declaration, Mr. Martel's attorney, Mr. Beck, told the court that because of discovery difficulties, and trouble identifying all of the deputies involved, he had been unable to gather sufficient evidence to go to trial. Under the *Maybusher* standard, such a showing should have sufficed to demonstrate prejudice.

Likewise, when we upheld a denial of a continuance in *United States v. Mitchell*, 744 F.2d 701 (9th Cir. 1984), because no prejudice was shown, we did not construe "prejudice" to mean that more time would have changed the outcome. We affirmed because the appellant did not specify "what defense theories his counsel might have explored, what aspects of the case she was unable to investigate, or what witnesses might have been interviewed." *Id.* at 705. *United States v. Lane*, 765 F.2d 1376, 1379 (9th Cir. 1985), says substantially the same thing in the same circumstances as *Mitchell*. Neither construes "substantial and actual prejudice" to mean

a demonstrated effect on the outcome, as the majority requires today.

In *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir. 1985), *amended*, 764 F.2d 675, we reversed a criminal contempt case because the district court denied a thirty day continuance. Flynt had behaved inappropriately in court, and was ordered to show cause why he should not be held in contempt. He had acted like a crazy man, and his attorneys sought a thirty day continuance to obtain a psychiatric evaluation of his mental capacity. We could not have reversed under the standard the majority now imposes, because Flynt's lawyers never produced evidence that the psychiatric report would have been favorable to the defense. We did reverse, however, because the psychiatric testimony would have been "potentially" helpful to the defense, and the "importance of expert witnesses to Flynt's defense is obvious." *Id.* at 1361.

We also reversed for abuse of discretion in denying a continuance in *United States v. 2.61 Acres*, 791 F.2d 666 (9th Cir. 1995). Seven years after this condemnation case was filed, and as it was about to go to trial, the government moved to bar the property owner from introducing evidence on the ground that its corporate standing had lapsed for nonpayment of taxes fourteen years before. The corporation unsuccessfully sought a short continuance so that it could pay the back taxes and revive its corporate standing. We held that the requirement of prejudice was satisfied because the denial "precluded Wawona from presenting any evidence concerning the value of the property." *Id.* at 671. This standard is not the same as a requirement that the evidence to be submitted would have changed the outcome.

Butcher's Union v. SDC Investment, Inc., 788 F.2d 535 (9th Cir. 1988), has strong language regarding the prejudice which must be shown to obtain a reversal because of denial of discovery. But it is not a continuance case. The plaintiffs sought discovery and the judge denied their motion a year and a half

before dismissal. The issue was materiality, not time. The Unions sought to sue various defendants in a RICO case on the theory that the ends of justice required nationwide jurisdiction, but the court decided that separate, local conspiracies were alleged, so only the California defendant was subject to jurisdiction in the case. On appeal, the Unions claimed that their discovery would have developed proof of sufficient local contacts to support California jurisdiction. But the presence or absence of local contacts had not been material to the district court's decision. The lack of prejudice resulted from this immateriality, not from insufficient proof that the discovery would have changed the outcome. No motion for continuance was at issue in the appeal. Likewise, no motion for continuance was at issue in *Data Disc, Inc. v. Systems Technology Associates, Inc.*, 557 F.2d 1280 (9th Cir. 1977). The issue was whether discovery regarding a jurisdiction issue should have been allowed, not whether more time should have been allowed before trial.

Sablan v. Department of Finance, 856 F.2d 1317 (9th Cir. 1988) affirmed a denial of a continuance. The dispute was about attorneys' fees. The government wanted a continuance to do more discovery regarding the amount, but all that was at issue on appeal was appellee's entitlement to fees as prevailing party. We held that there was no prejudice because the government sought no information "calculated to provide facts germane to the 'prevailing party' issue." *Id.* at 1321-22. Our test of "prejudice" was thus whether the discovery was calculated to provide information "germane" to the issue, not whether it would have caused the case the reach a different result. The majority does not suggest that the discovery sought by Mr. Martel's lawyer was not "germane."

The case at bar falls exactly into the class of cases like *Flynt* and *2.61 Acres*, where we have held that the prejudice requirement was satisfied, and outside the class of cases like *Lane* and *Butcher's Union*, where we have held that it was not. Like those cases in the first class, and unlike those in the

second, appellant has specified what he wanted to do with more time — get more documents from the Internal Investigation Bureau investigation files and personnel files, and depose the deputies who participated in the arrest. And as the *Sablan* panel put it, the information sought was reasonably calculated to produce facts germane to the issue before the district court. *Sablan*, 856 F.2d 1321-22.

According to the standard for prejudice universally applied by our prior precedents, appellant did demonstrate "substantial and actual prejudice." Mr. Beck specifically declared what evidence he wanted and why he had been precluded from getting it. That satisfies *Sablan*. Additionally, the deposition testimony from the deputies was clearly germane to the issue of liability. That satisfies the prejudice requirement of *Flynt*. Could Mr. Martel and his lawyer prove that the outcome would have changed if they had been granted extra time to do the discovery? No, not without knowing the outcome of the depositions before they occurred. But that is not the standard we have applied in the past, and I respectfully suggest that we err in doing so today. We do not need an expensive transcript to apply the test of prejudice established by our precedents: whether the denial of the continuance resulted in an inability to collect material evidence or locate material witnesses. That test is satisfied.

C. Speed and Justice

As the above explication of our precedents demonstrates, appellant in this case has indeed demonstrated "actual and substantial prejudice," as the term has traditionally been construed in continuance cases. The majority opinion puts a new gloss on the term, requiring more than we have required before. It disposes of the appeal entirely on the basis of failure to show prejudice, so diligence, usefulness, and inconvenience, the other three *Flynt* factors, are not reached or considered. Of course, we can change our course in an en banc decision, so it is not enough for me to say that we are chang-

ing course. I must say why we should not. While I fully agree with the traditionally restrictive and deferential review we give to denials of continuances, I nevertheless think that the "rocket docket," allowing three months from answer to trial, gives up too much justice for the speed it gains.

Ever since Roscoe Pound said "justice delayed is justice denied" some people have inferred that faster is always better. But too much speed as well as too much delay can deny justice. Speed of the litigation process should be managed so that the truth, not the speed, determines the outcome. One reason why "the law's delay" is an ancient phrase is that fair resolution of a dispute takes time.

Why should this case have taken more than three months to prepare? The reason is that in civil litigation, the federal rules of civil procedure make discovery the core of trial preparation. Most cases settle after the lawyers find out the facts, and determine that their estimates of value overlap. For those that go to trial, discovery typically establishes the evidentiary basis for the jury's verdict. Under the deadlines established by the federal rules, and the practicalities for making the discovery provided for, three months allows too little time for discovery. There doubtless are individual cases where, in a status and scheduling conference shortly after commencement, the district judge may exercise reasonable discretion to limit discovery and accelerate trial, but no such individualized discretion was exercised to bar discovery in this case. The issue on appeal in the case at bar was time for discovery, not appropriateness of the discovery.

Mr. Martel's lawyer had a schizophrenic, delusional client who was unlikely to be of great help in preparing the case. There had been no criminal trial, because Mr. Martel was not charged with a crime, so Mr. Beck could not read a transcript to see what the deputies said about the incident. He had diligently pursued the paper discovery — interrogatories and requests for production — but it had not yet been completed,

evidently because of a good faith dispute about what was discoverable, and perhaps because of secretarial carelessness in the defense attorney's office or sheriff's office in copying the Internal Investigation Bureau file. The rules generally allow thirty days for responses to paper discovery, and that much time or more is generally necessary for the document searches necessary for compliance. Mr. Beck had a good reason to have delayed his depositions — he was exceedingly busy in other trials throughout the summer. Based on the local rules, he had a right to accept the case and plan his handling of it on the assumption that it would not go to trial before October at the earliest.

The delays in this case were not unusual. Before a lawyer can serve paper discovery or make a motion to amend, he must review the file, think about what discovery would be worth doing, and draft the papers to accomplish it. When a lawyer receives such papers, she must read them, mail them to her client, and advise her client on response duties. The client must then determine how the information can be found and who should look for it, direct an appropriate search, assemble the material, and produce it.

Every detail of every step takes time. Sending papers means a lawyer dictates them, a secretary types them, the lawyer revises them, the secretary returns the final copies, the lawyer signs them and gives the secretary directions for service, the secretary photocopies and mails them, and the post office delivers them. Responding to discovery means responding counsel reads the papers, dictates instructions to her clients, goes through the same process of getting the papers from conception to delivery. The client assigns people to look in file cabinets, put yellow stickies and paper clips on materials in the files, consult the lawyer on the telephone about whether various documents are meant to be included, photocopy designated papers, write explanations and responses, and send them to the lawyer.

This adds up to weeks even when there are no special difficulties. That is probably why the rules allow thirty days for response. Some of this delay could be avoided, if instead of processing papers in the ordinary ways, all the lawyers, clients and secretaries left their desks and did everything together, orally, at the same time. But that would greatly increase the expense. The clients would have to pay the lawyers to stand around with the secretaries as they went through the file cabinets, the secretaries would have to stand around as the lawyers read and tabbed material, and everyone would have to stand around as the files were disassembled and the discoverable pieces photocopied. Much advance preparation by the lawyers and clients would be needed for such important and fast moving discovery. The cheapest way to get the routine paper discovery done is usually the routine, somewhat slow way described.

I can see no good reason for the federal courts to tell lawyers, "if you accept a case, you should depose the witnesses immediately, and be prepared to treat it as a priority so that it can go to trial in three months." This conflicts with the requirement of Federal Rule of Civil Procedure 1, that the rules be construed to secure "inexpensive" resolution of disputes. Most lawyers are already quite busy, as Mr. Beck was, when they take on a new case. That is good, not bad. It keeps [illegible]n. Lawyers' fees must be higher, or their incomes lo[illegible], if they cannot manage the scheduling of cases so that they can keep busy all the time. If federal district court cases must take on the kind of priority the "rocket docket" requires, then lawyers defending them must maintain a staff of underemployed attorneys to whom they can assign the work. That raises prices on the defense side. On the plaintiffs' contingent fee side, prices are raised by rejecting cases unless liability is highly likely and damages are great. A price increase to plaintiffs typically manifests itself in rejection of cases with strong liability but smaller damages, such as injuries but no death, paralysis or brain damage. That reduces the availability of a remedy for violations of constitutional rights. On both

sides, too much speed makes the case more expensive to litigate.

Too much speed also has a corrosive effect on civility. The traditional answer, when a lawyer calls an adversary and says "would you give me an extension, so that I can go to my children's summer camp parents' day?" is "Yes, of course." But a highly compressed schedule requires that the answer be "sorry, I can't." That forces the lawyers into court to claim bad faith discovery demands, bad faith responses, and make other attacks on each other which would often be unnecessary if they had time to work out reasonable and practical discovery exchanges. The less pleasant lawyers' work becomes, the more they will charge to do it.

Increased expense and loss of civility are not the only, or the most important, casualties of too rapid a docket. The most important requirement in Rule 1, and in any system of justice, is that the system be just. A verdict, as the etymology of the word implies, should be true. Justice requires that the outcomes be reasonably reliable. After all, we could get speedy and inexpensive dispute resolution by flipping coins. Justice requires reliable, that is, true, verdicts. Too much speed reduces reliability, so produces less just outcomes. More verdicts are likely to be false if federal civil cases go to trial so quickly that reasonable discovery cannot be completed first.

In most cases, both sides have facts which it would be to their advantage that the other side not find out. For example, in this case, hypothetically, Mr. Martel might have preferred that the defense not find out that he had not been taking his prescribed medication to control his psychosis, and the defense might have preferred that the plaintiff not find out about some differences in perception, recollection and judgment among the deputies. If there is ample time for discovery, then these sorts of things are likely to be found out. But if there is not, the probability of disclosure is reduced. The value of hiding evidence is much greater if the risk of discovery is

reduced. If the case proceeds too speedily to trial, the jury is likely not to hear some critical evidence, because it will never have been discovered by the party to whose advantage it would be to bring it out.

This is not to suggest that lawyers would routinely hide evidence they know they should produce. Often it takes considerable time, thought and effort for parties to discover their own evidence, particularly if they are multidepartmental institutions, or if they do not yet fully understand what will turn out to be relevant. In this case, it is significant that neither side could prepare it in three months. The plaintiff needed, but was denied, more time to get the facts on liability, which were largely under defense control. The defense needed, and was given, more time to get the facts on damages, which were under plaintiff's control.

Many lawyers prudently delay depositions until they have received the responses to paper discovery. That way they know what to ask. Depositions are expensive. They can often be more focused, shorter, cheaper and fewer, as well as more productive of truth, if they are preceded by paper discovery. Sometimes the paper discovery facilitates settlement or dismissal without the expense of depositions. Professor Keeton explains why depositions are often best delayed until after paper discovery:

> Another reason often relied upon in delaying the deposition of an adverse party or witness is the desire for completion of all practical investigation before the deposition is taken, so that the lawyer taking it for discovery purposes will be better informed as to matters concerning which it will be wise for him to question the adverse witness or party.

Robert E. Keeton, Trial Tactics and Methods 382 (1954). The "rocket docket" forces lawyers to notice up all possible depositions as soon as they get the case, even though that is likely

greatly to increase expense and reduce the truth-seeking value of the depositions.

III. CONCLUSION

In this case, appellant demonstrated substantial and actual prejudice as the term has traditionally been understood in the context of review of denials of continuances. We should apply the *Flynt* criteria and reverse, as we did in our earlier panel decision. Federal procedure should provide "just, speedy, and inexpensive" resolution of disputes. The "rocket docket," and our decision in this case, sacrifice two of those desiderata to the third. Cutting the time from answer to trial to three months is not worth the burden it imposes on justice.

REINHARDT, Circuit Judge, Dissenting:

The majority opinion is what it is. Judge Kleinfeld's dissent, in which I fully join, effectively disposes of its reasoning. However, Judge Canby's concurrence, joined by Judge D.W. Nelson, is extremely disappointing. We should, as judges, be able to bring a little practical knowledge, understanding, and wisdom to the decision-making process. To suggest that in a case in which the plaintiff alleges that he was assaulted by a number of sheriff's deputies, the testimony of those deputies could be anything but critical, or the denial of the right to take their depositions could be anything but harmful, is either incredibly naive or wholly elevates form over substance. We are here after all, as I am sure Judges Canby and Nelson would agree, to seek truth and do justice. What more need a plaintiff show other than that it was the alleged perpetrators of the constitutional wrong whose depositions he was precluded from taking? There is a limit to the Frankfurter view of jurisprudence. I think we exceed it here.

Moreover, if it were so critical that we determine from a transcript what we all know anyway, the Rules permit us to

order what we need. *See* Federal Rule of Appellate Procedure 10(e). I hardly think it necessary to force a mentally disturbed civil rights plaintiff to pay for a transcript in a case such as this. Certainly, his failure to do so should not cause us to forfeit his appeal and his rights.

FLETCHER, Circuit Judge, Dissenting:

I concur wholeheartedly in Judge Kleinfeld's and Judge Reinhardt's dissents. I simply add an additional perspective to their excellent opinions.

The majority declines to decide whether the trial judge abused his discretion in denying a continuance to allow the completion of discovery. It looks only to prejudice after trial.

I respectfully suggest it is important to a proper analysis and understanding of the district court's role to decide whether the judge abused his discretion.[1] Why do I think it important? Whether the movant is likely to suffer prejudice from the denial of a continuance is an element of the determination that the district judge should make in granting or denying the opportunity for further discovery. The district judge would abuse his discretion if he prejudiced the plaintiff's ability to prepare his case. In this case, the judge broke his own court's rules by shortening the *minimum* time the parties are allowed for preparation. Prejudice should be presumed—the burden to rebut prejudice then, should be on the defendants.

By its own admission, the majority concedes "the necessity and propriety of the force used . . . was the primary issue at trial." (Maj. Op. p. 5989, fn. 1.) The inability to depose the

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[1]I agree with the two dissents and the inference in the concurring opinion of Judge Canby (in which Judge D.W. Nelson concurs) that an abuse occurred.

defendant-perpetrators as to their individual roles in the incident, what they perceived as to the roles of other defendants, why they did what they did when they did it, of course, was prejudicial.

The majority expresses its "unwilling[ness] to engage in ruminative speculation." (Maj. Op. at 5993.) May I suggest the majority's narrow focus as to what is prejudice is the vice. It doesn't take a rocket scientist to perceive the prejudice that resulted from the "rocket docket's" application in this case. It takes no ruminative speculation to see it.

Supreme Court, U.S.
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No. 95-407

In the Supreme Court of the United States

October Term, 1994

ANGEL MARTEL,
Petitioner,

vs.

COUNTY OF LOS ANGELES, ET AL.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

May a litigant obtain reversal of a jury verdict for failure to continue a trial to allow further discovery without making any showing of prejudice?

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Preliminary Statement

Plaintiff Angel Martel seeks certiorari from this Court for the sole purpose of eliminating the requirement that an appellant who seeks to reverse a jury verdict for failure to grant a continuance establish that he or she has been clearly prejudiced by the lack of a continuance.

Plaintiff has not cited a single case in any circuit which stands for such a startling proposition. To the contrary, an unbroken line of precedent recognizes the logical proposition that district judges are the primary gatekeepers for determining when a trial should be postponed to allow additional discovery. They also recognize that litigants who seek to upset this discretion must establish "clear error" in two separate categories: (1) the need for a continuance, and (2) the prejudicial impact of the failure to grant one.

Plaintiff has failed to demonstrate an abuse of discretion as to either ground. Purely to justify this failure of proof and the absence of any record, plaintiff simply proposes to jettison the standard and to do away with either the requirement for a showing of need *or* a showing of prejudice.

First, plaintiff's petition is devoid of any fact-based

analysis of his manifest need for a continuance to allow additional discovery. This failure is understandable. Plaintiff never filed a timely motion for a continuance. Instead, his counsel made an ex parte application for a continuance on the very eve of trial. Plaintiff's counsel never established that he was denied the opportunity to engage in "meaningful" discovery during the three months between filing the complaint and the trial; instead, he simply filed a barebones explanation that he was too "busy" with other cases to do so.

Is certiorari necessary to allow attorneys to reverse jury verdicts based on ex parte, last minute motions for continuances?

In reality, the record shows that plaintiff's counsel never took a single deposition of any of the key witnesses in this case, even though he knew their identities little more than a month after he filed his complaint. Plaintiff's counsel

went into this trial blind, not because of any "rocket docket", but because he overbooked his own calendar, thereby preventing him from adequately representing his clients. Further, counsel never made any showing about how much additional discovery time would be necessary to permit him to engage in "meaningful" discovery. Days? Weeks? Months? Counsel cannot be heard to complain if his caseload has prevented him from pursuing discovery diligently before trial.

What meager record there is shows that plaintiff's counsel was so preoccupied with other cases that he never took advantage of *any* of the available discovery opportunities to depose numerous critical witnesses whose identities he knew. The district court acted well within its discretion in determining that additional time would not have availed him.

Second, plaintiff's petition should be denied because

of his failure to show that his case was *actually* prejudiced. There is *no* reporter's transcript. Why not? Without any sense of what transpired in this case, this Court, like the Ninth Circuit, is left completely in the dark about what additional discovery was needed and why.

The trial in this case only took three days. Despite the ease (and relatively minor expense) of preparing a reporter's transcript, plaintiff's counsel did not do so. There is *no* reporter's transcript of the proceedings at trial, nor is there any written record that plaintiff preserved his claims of error at trial.

Reasonable deadlines are constitutionally permissible and administratively necessary. District judges, by necessity, must be given wide latitude for case management. There is no abuse of discretion here.

Statement of the Case

Plaintiff filed his complaint on April 22, 1991

against the County of Los Angeles, Sheriff Sherman Block and a single sheriff's deputy Elias Cuevas arising out of an incident which occurred on June 16, 1990. (CR 1.) The County and Sheriff Block filed their answer to plaintiff's complaint on May 17, 1991. (CR 3.)

The underlying incident arose out of an emergency "911" call by plaintiff's wife, who was fearful that plaintiff was about to hurt or kill his brother during a physical altercation over control of a shotgun. Plaintiff, then under psychiatric treatment as a paranoid schizophrenic as the result of an industrial accident, had refused to take his medication and was under extreme forms of delusional thought. The defendant deputies responded to the emergency call and attempted to wrest the shotgun away from plaintiff and to control him. As a result of his unmedicated condition, plaintiff exhibited an enormous amount of strength and was impervious to pain. Plaintiff

eventually was subdued, sustaining some injuries to the struggle, and taken to the hospital. His treating psychiatrist placed him under a 72-hour hold so that he could medicate him and take him to the hospital. (CR 29 at 3:3-19:22.) Contrary to the allegations of the complaint, plaintiff was never arrested, booked or prosecuted. (*Id.* at 7:8-10.)

Plaintiff's counsel was on notice from the very outset of this case that the matter had been assigned to a district judge who endeavored to conduct discovery in an "orderly" and "cooperative" manner and to set trial dates "as early as possible." (CR 9 at 2:27-3:1.)

By May 24, 1991 – just a month after he filed his lawsuit, plaintiff' counsel was informed of the names of seven of the eight deputies who responded to the emergency "911" call. (CR 14, 15, CR 29 at 11:11-14; CR 55 at 2:25-28.) These deputies were each available for deposition in the spring and summer of 1991. (CR 55 at 3:11-13.) At that

time, plaintiff's counsel had both the right *and the opportunity* to conduct discovery, including taking the depositions of each (or all) of these deputies.

On May 31, 1991, just five days after plaintiff's counsel received the names of the deputies, the district court issued an order which set a mandatory status conference on June 24, 1991. (CR 9.) The court order also indicated that counsel should anticipate a trial date *within* two to four months of the mandatory status conference in such a non-complex case. *Ibid.*

Plaintiff's counsel personally attended the mandatory status conference on May 31, 1991. The district judge set the pretrial conference for August 26 and a *firm* trial date for next day, August 27. (CR 11, 12.) The district judge did so only after analyzing the issues in the case, exploring each side's factual and legal theories. (CR 9.)

Plaintiff's counsel knew that August 27 trial date was

"firm." (CR 2, 9; Hrng.Tr. 5:5-6.) Despite this, plaintiff's counsel did not take advantage of the *opportunity* for discovery during the summer months of 1991. None of the five deputies either named in the complaint or identified by defendants in their May 1991 discovery responses were deposed during June, July or August of 1991. Defendants essentially completed their discovery by mid-July. (CR 55 at 30:20-28.)

Plaintiff's counsel conducted no other discovery until nearly three months later, in August 1991 when he propounded interrogatory questions which went solely to issues related to the "policymaker" liability of the County and Sheriff Block under *Monell v. New York City Department of Social Services,* 437 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). (CR 30.) *Monell* was bifurcated from the main action. (CR 35, 39.)

On August 22, five days before trial, plaintiff filed an

ex-parte application to continue the pretrial conference and trial dates. (CR 28.) The application was untimely and outside the limits permitted by the local rules. Moreover, it falsely claimed that plaintiff's counsel had only "recently" learned of the identities of the defendant deputies. In reality, the record established that counsel had known of the deputies' identities since May 24, and counsel made no showing why he did not take their depositions during this three month period. Counsel claimed to be "engaged" in a variety of other matters, including a claim that he was "engaged" in a trial before U.S. District Judge Consuelo Marshall on August 23 and August 24. Although counsel had actual notice of the trial date in this case at the June 24 status conference, he did not explain why he waited until the eve of trial to file his request for a continuance, or why he proceeded on an ex parte basis.

The district court denied plaintiff's ex parte

application to continue the trial date, admonishing plaintiff's counsel for his dilatory discovery. (Hrng.Tr. 3-7.) The district court further ascertained that plaintiff's counsel's references to being "engaged" in another matters were false and misleading, including the fact that Judge Marshall's courtroom was dark while counsel claimed to be "engaged" there. (*See* Hrng.Tr. 6:20-7:12.)

The trial began on August 27, 1991. A critical witness was the psychiatrist who was treating plaintiff for his schizophrenia. This psychiatrist, who had no connection with the sheriff's department, examined plaintiff on the day of the incident and recommended that he be institutionalized. The psychiatrist also opined that plaintiff was undergoing such a psychotic state that force was necessary, in his opinion, to subdue him. (CR 29 at 6:20-22.) It was subsequently revealed that plaintiff's counsel had not even spoken or interviewed with this critical witness

until the day of trial. (CR 53 at 8:10-17.)

After three days of testimony, the jury returned with a defense verdict that no constitutional violation occurred. (See CR 42.) Given the jury's finding that the individual deputies did not violate plaintiff's constitutional rights, the district court dismissed plaintiff's contingent "*Monell*" claims. *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986). (CR 23 at 11:24-26, 12:7-14.)

Plaintiff appealed to the Ninth Circuit, but did not designate a reporter's transcript of the trial proceedings.

Plaintiff's appeal was heard by a Ninth Circuit panel consisting of Circuit Judges Stephen Reinhardt, Jerome Farris and William A. Norris. By a 2-1 vote, the panel reversed the jury verdict. *Martel v. County of Los Angeles*, 34 F.3d 731 (9th Cir. 1994). Judge Reinhardt, writing for the panel majority, held that it was "improper for the district court to hold counsel's busy schedule against his client in

this case." Panel op., 34 F.3d at 734, slip op. at 10361.

> "[W]here counsel's busy trial schedule is the primary reason for a delay in trial preparation, a continuance should generally not be denied in the absence of a prior warning, an exploration of the legitimacy of counsel's conflicting engagements and the extent to which an accommodation of counsel's schedule would prejudice the opposing party or inconvenience the court, . . ." Panel op. 34 F.3d at 735, slip op. at 10362.

The panel excused plaintiff from any obligation to provide a summary of the testimony in the case because the prejudice was "'fully apparent on the face of the record on appeal.'" Panel op., 34 F.3d at 738, slip op. at 10369. Instead, the panel took its factual discussion of the

circumstances of the case from the allegations in plaintiff's original complaint, *not* from any actual testimony. See Panel op., 34 F.3d at 732, slip op. at 10358.[1]

The Ninth Circuit granted a rehearing en banc and affirmed the judgment on the jury verdict. Eight judges concurred in the decision. Three judges, including Judge Reinhardt (the only judge on both panels) dissented. *Martel v. County of Los Angeles,* 56 F.3d 993 (9th Cir. 1995).

Plaintiff thereupon filed the instant petition for writ of certiorari.

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[1]This same complaint erroneously alleged that plaintiff had been arrested and prosecuted on the basis of false and fabricated testimony by the district attorney. In reality, plaintiff was never arrested nor prosecuted.

Argument

I. CERTIORARI SHOULD BE DENIED BECAUSE OF PLAINTIFF'S FAILURE TO ESTABLISH "CLEAR ERROR" FROM THE DENIAL OF HIS EX PARTE REQUEST FOR ADDITIONAL DISCOVERY.

The record, viewed most favorably to the district court, does not demonstrate that the district court clearly abused its discretion in denying plaintiff's ex parte motion for a continuance. This failure alone is intensely fact specific and raises no systemetic issues calling for this Court's scarce time and resources.

Plaintiff's eleventh hour application for a continuance was filed *ex-parte*, five days before trial. The application provided no legitimate explanation why plaintiff was unable to conduct discovery within the time frame set by the district court.

Waiting until the eve of trial to request a

continuance is unacceptable. *See Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964) (affirming judgment after motion for continuance made on the day of the scheduled contempt hearing of a lawyer familiar with the court's practice of not granting adjournments.) Making the requisite showing of prejudice on an ex parte basis is even less acceptable. "Ex parte applications are not intended to save the day for parties who have failed to present requests when they should have, . . ." *In Re Intermagnetics America*, 101 B.R. 191, 192-193 (C.D. Cal. 1989), emphasis added.

This Court's decision in *Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610, 1616, 75 L.Ed.2d 610 (1983) is closely on point. There, this Court upheld the denial of a continuance, stating:

> "Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of

> assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons. Consequently, *broad* discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel. [Citation.]" Emphasis added.

See also *Avery v. Alabama,* 308 U.S. 444, 446, 60 S.Ct. 321, 84 L.Ed. 377 (1940): "[D]isposition of a request for a continuance is . . . made in the discretion of the trial judge, the exercise of which will ordinarily not be reviewed."

Plaintiff's petition for writ of certiorari does not even mention the issue of his factual showing of the need for a continuance. Contrary to the rules of appellate review, his appellant's opening brief before the Court of Appeals took

his own self-serving version at face value and gave no credence to the contrary facts which supported the district court's discretionary determination to deny a continuance. "The decision to grant or deny a requested continuance lies within the broad discretion of the district court, and will not be disturbed on appeal absent *clear* abuse of discretion." *United States v. Flynt*, 756 F.2d 1352, 1358 (9th Cir.), modified, 764 F.2d 675 (9th Cir. 1985), emphasis added.

No reason to exists to grant certiorari on a case with such a weak record to sustain the need for a continuance. The record does not support plaintiff's assertion that he was denied all opportunity for "meaningful" discovery. Instead, plaintiff provided the district court with an untimely, imprecise and misleading litany of excuses why his "busy" counsel did not even take advantage of the discovery opportunities which existed.

The fact that an attorney (even a sole practitioner) is "busy" is not good cause for a continuance. *McLaughlin v.*

LaGrange, 662 F.2d 1385, 1387 (11th Cir. 1981), cert. denied, 456 U.S. 979 (1982). Vague references to being "engaged" in other trials do not meet plaintiff's burden of establishing unavailability through competent evidence. See *Weisman v. Alleco, Inc.*, 925 F.2d 77, 79 (4th Cir. 1991).

> As the First Circuit recently observed, "'[m]ost attorneys are busy most of the time and they must organize their work so as to be able to meet the time requirements of matters they are handling or suffer the consequences.'" *Mendez v. Banco Popular de Puerto Rico*, 900 F.2d 4, 7 (1st Cir. 1990).

The district judge, who was in a better position to perceive counsel's state of preparation, accurately understood that lack of preparation, not lack of opportunity, was the cause of plaintiff's failure to take the deputies' depositions. (*See* Hrng.Tr. 4:15-23.) "Appellate courts cannot too readily agree to meddle in such case-management decisions lest the trial court's authority be

undermined and the system sputter." *Mendez*, 900 F.2d at 7; *Stitt v. Williams*, 919 F.2d 516, 526 (9th Cir. 1991) (one month adequate time to conduct and review depositions.)

Here, the district court conducted a mandatory status conference at which time it analyzed various facets of this case, including the parties' factual and legal theories, as well as unusual problems that could arise at trial. (See CR 9.) It was only after the district court obtained the necessary information that the pretrial conference and trial dates were set. Plaintiff has not met his burden of showing why he was not more diligent in pursuing the discovery opportunities that he had, or that the denial was "arbitrary" or "unreasonable." *United States v. Flynt*, *supra*, 756 F.2d at 1358. In view of the "nearly impossible demands" placed on trial judges, the district judge acted within his discretion in closely monitoring his calendar to prevent needless delays. *Kagan v. Caterpillar Tractor Co.*, 795 F.2d 601, 608 (7th Cir. 1986).

II. FAR FROM BEING DIVIDED, THE CIRCUITS UNIFORMLY REQUIRE A SHOWING OF PREJUDICE FROM A DENIAL OF A CONTINUANCE.

Plaintiff claims that there is a "sharp division" between the Ninth Circuit and the other circuits because of the Ninth Circuit's requirement that litigants "henceforth" must demonstrate prejudice from a failure to continue a trial to allow additional discovery. (Petition at 14.)

Plaintiff's division doesn't add up. In reality, the circuits are united in requiring a showing of prejudice. See e.g., *United States v. Scott,* 48 F.3d 1389, 1393 (5th Cir. 1995): "'This court will reverse a district court's decision denying a defendant's motion for continuance only when the district court has abused its discretion *and* the defendant can establish that he suffered serious prejudice'"; *United States v. Blandina,* 895 F.2d 293, 297 (7th Cir. 1989): "[A]ny prejudice resulting solely from the denial of the continuance motion is, at best, speculative."; *United States v.*

Davis, 967 F.2d 516, 518-519 (11th Cir. 1992): "Most important, appellant has failed to show how additional time would have aided her defense and how she was specifically prejudiced by the court's failure to grant a continuance."

> "The lack of demonstrable prejudice sounds the death knell for a 'delayed discovery' claim. See *United States v. Devin*, 918 F.2d 280, 290 (1st Cir. 1990) (explaining that a defendant who complains about tardiness in disclosure 'cannot rely on wholly conclusory assertions but must bear the burden of producing, at the very least, a prima facie showing of a plausible strategic option which the delay foreclosed.')" *United States v. Sepulveda*, 15 F.3d 1161, 1178 (1st Cir. 1993).

In *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 93 (5th Cir. 1992), a civil litigant complained, like plaintiff

here, that a trial court engaged in "trial by ambush" by forcing it to cross-examine a surprise witness whose identity had not been disclosed until ten days before trial. Although the litigant claimed a denial of its rights to cross-examine an adverse witness, the 5th Circuit found no prejudicial error:

> "The City does not explain how the admission of such evidence prejudiced its defense. Furthermore, the City does not indicate what it might have been able to establish during cross-examination if it had more time to prepare for this witness. Consequently, nothing in the City's argument suggests that a continuance would have substantially aided the City's preparation. *Lacking any proof of prejudice to the City,* we find that the district court did not abuse its discretion in admitting this evidence."

(Emphasis added.)

Other courts have had no difficulty with requiring appellants to establish with some specificity how a continuance would have made a difference. "While we do not believe that it would be fair to ask appellate counsel to describe in great detail testimony that was never given, it is fair to require that the expected testimony will be set forth in sufficient fashion to allow the reviewing court to determine the matter of prejudice." *United States v. Koen,* 982 F.2d 1101, 1115 (7th Cir. 1992).

Here, plaintiff made matters much worse by failing to provide any transcript at all. As a result of this unexplained omission, no appellate court can know how the defendant deputies testified and how their testimony affected plaintiff's case. Indeed, no appellate court can even know what plaintiff's case turned out to be. To quote from concurring judge Canby:

> "Martel, however, has given us nothing. We have no way of knowing the content of the deputies' testimony, or whether that testimony loomed large in the trial. We do not know whether Martel's own witnesses destroyed his case. [We are] basking in total ignorance of the events at trial." En banc op., 56 F.3d at 998, slip op. at 5997.

Such speculation from a silent record runs counter to the nature of discretionary decisionmaking and it contradicts the fundamental obligation of an appellant to present an adequate record for appeal.

The warnings of the Court of Appeals in *United States v. Raimondi,* 760 F.2d 460, 461-462 (2nd Cir. 1985) cogently apply:

> "When lawyers begin to perceive scheduling orders as precatory, we all suffer the

consequences. . . Cynical practitioners, aware of our desire to hear from both sides to every dispute by means of a thorough brief, may have come to expect such [relief from default for attorney neglect] to be granted as a matter of course. They would be ill-advised to assume such is the case."

Conclusion

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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By
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(3)

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No. 95-407

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

ANGEL MARTEL,

Petitioner,

vs.

COUNTY OF LOS ANGELES, et al.,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 15.6 of the Supreme Court Rules, the Petitioner, Angel Martel, respectfully submits this Reply to the Respondents' Brief in Opposition to his Petition for Writ of Certiorari.

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I.

Respondents materially misstate the question presented to the Court. The question here is not whether or not prejudice must be shown, but rather the scope of the proof necessary for the requisite showing of prejudice.

Respondents attempt to mislead the Court by incorrectly framing the issue posed by the Ninth Circuit's en banc decision. Petitioner has never urged the inapplicability of the harmless error rule. As Martel consistently argued below, and as found by both the Ninth Circuit panel and those judges who wisely dissented from the Court of Appeals en banc decision, Martel indeed was prejudiced by the district court's arbitrary restriction of discovery and concomitant refusal to continue trial of the cause.

Contrary to Respondents' assertions, the question actually presented to the Court is whether an appellant may show prejudice without demonstrating that the verdict against him would have been altered by the admission of substantive or impeachment evidence gained through discovery. The Ninth Circuit panel answered this question affirmatively, stating that "it is both unfair and pointless to

require a specific showing of the impact the district court's error had on the outcome of the proceeding." Panel op., 34 F.3d 731, 735, slip op. at 10363. The dissent to the en banc decision likewise advocated that the requisite demonstration of prejudice be made without showing "that the outcome of the case would have been different, had the continuance been granted." En banc op., 56 F.3d 993, 1000, slip op. at 6002.

Martel's position is that when a trial court denies appellant a continuance for further discovery, prejudicial error is shown if the total time permitted for discovery is so short that, given the entire course of the discovery proceedings (including the need to compel discovery from opponents), the complexity of the case and the exigencies of litigation practice, the appellant's attorney could not reasonably uncover material evidence or locate material witnesses. Such a showing should not be made without demonstrating that the appellant formulated a prudent plan for discovery and then diligently propounded a reasonably planned sequence of discovery demands. What should not be required, however, is the further showing demanded

under the Ninth Circuit's en banc opinion; specifically, a particularized demonstration that the outcome of the trial would have been different had time for discovery been extended.

Respondents further muddle the question presented to the Court by unnecessarily revisiting the issue of the district court's error in denying Martel's request for a continuance. Resp. Brief at 2-4, 7-10, 15-20. Apparently, Respondents are confused about the very scope and purpose of Supreme Court review. The Court does not ordinarily address an issue which the Court of Appeals has not addressed. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 568, 101 S.Ct. 1923, 1930 (1981); *accord, Patrick v. Burget,* 486 U.S. 94, 99 n.5, 108 S.Ct. 1658, 1662 n. 5 (1988).

Martel seeks review of the Ninth Circuit's en banc construction and application of the harmless error provisions of 28 U.S.C. §2111 and Rule 61 of the Rules of Civil Procedure. The en banc opinion was expressly limited to the question of actual prejudice under the harmless error rule, and specifically did not address whether the trial court

abused its discretion in denying Petitioner a continuance. 56 F.3d at 995, slip op. at 5991. Accordingly, the propriety of the continuance would not be an issue which the Supreme Court would need to address. [1]

In an apparent effort to detract from the merits of Martel's petition, Respondents recite facts immaterial to the construction of the harmless error rule. For example, Respondents emphasize that Martel did not take the depositions of the eight Sheriff's deputies named as defendants in his lawsuit. Resp. Brief at 4, 9. Although this fact may bear upon the trial court's discretion in

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1 In any event, Respondents fail to cite authority in support of the district court's denial of the requested continuance. *Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610 (1983), cited by Respondents (Resp. Brief at 16-17), actually lends credence to Martel's position that the district court abused its discretion in denying a continuance. The Ninth Circuit panel found that the trial judge had, in effect, exhibited "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay'". 461 U.S. at 8, 103 S.Ct. at 1616. This holding was undisturbed in the en banc opinion.

denying Martel a continuance for further discovery, it hardly is material to the application of the harmless error rule. [2]

II.

Respondents do not refute Petitioner's showing of a split among the circuits regarding the requirements for showing prejudice.

Respondents assert that "the circuits are united in requiring a showing of prejudice." Resp. Brief at 21. This is not surprising, since the question presented to the Court is not *whether* prejudice need be shown, but rather *how* it must be demonstrated.

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2 As the dissent aptly pointed out in the Ninth Circuit's en banc opinion, depositions are often prudently delayed until after responses to written discovery have been obtained. En banc op., 56 F.3d at 1005, slip op. at 6013. In Martel's case, responses to written discovery were not due until after the trial date, even though Martel had promptly served the defendants with interrogatories and inspection demands. Panel op., 34 F.3d at 733, slip op. at 10358.

None of the cases cited by Respondents require an appellant to show precisely what he or she would have gained from additional discovery and how it would have changed the ultimate result at trial. With one exception, all of the cases cited by Respondents are criminal cases involving the Sixth Amendment issue of effective assistance of counsel.

The harmless error rule was not even discussed in *United States v. Scott,* 48 F.3d 1389 (5th Cir. 1995). In *United States v. Davis*, 967 F.2d 516 (11th Cir. 1992), *United States v. Devin*, 918 F.2d 280 (1st Cir. 1990), and *United States v. Blandina,* 895 F.2d 293 (7th Cir. 1989), the defendants were able to obtain all discoverable evidence; the issue in each case was whether the respective defendant had adequate time to review the that evidence in preparation for trial. In *United States v. Sepulveda*, 15 F.3d 1161 (1st Cir. 1993), the defendants had failed even to request a continuance from the court. Accordingly, they lacked standing to assert a "delayed discovery" claim. *Id.*

In *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82 (5th Cir. 1992), the only civil case cited by Respondents,

the issue was not the plaintiff's lack of opportunity to gather evidence, but rather the testimony of plaintiff's "surprise" witness, admitted over the city's objection. The appellate court held that the city had failed to explain how the witness's testimony had prejudiced its defense. This case obviously bears little resemblance to Martel's, where the appellant could not possibly know the affect of evidence never gathered.

Of the cases cited by Respondents, only *United States v. Koen*, 982 F.2d 1101 (7th Cir. 1992), touches on the issue presented to the Court by Martel's petition. Interestingly, the passage quoted by Respondents (Resp. Brief at 24) expressly acknowledges the unfairness of requiring an appellant to describe in detail testimony which was never presented. However, even if this rather ambiguous decision were construed to portend the Seventh Circuit's position on the question presented within, a split would still exist among the circuits regarding the requirement that an appellant demonstrate that additional discovery would effect the outcome at trial. As explained in Martel's petition, the Fourth, Fifth and Sixth circuits all

employ clear standards differing radically from that now set by the Ninth Circuit.

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